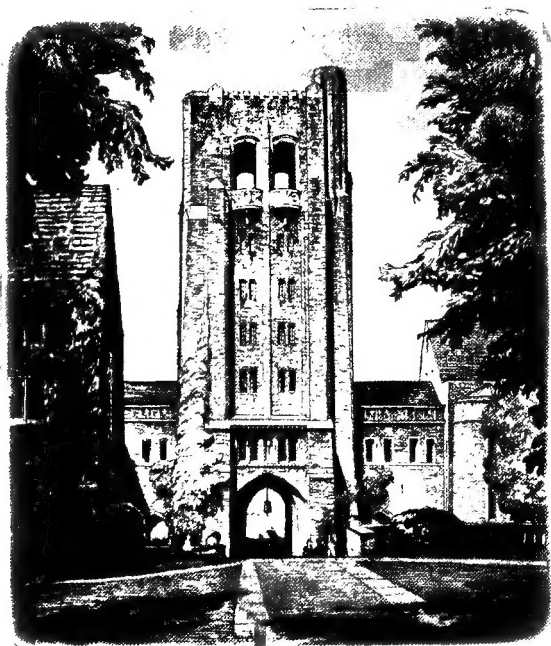


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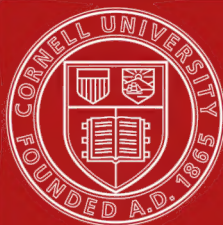
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A treatise on fraudulent conveyances : an



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A TREATISE
ON
FRAUDULENT CONVEYANCES
AND
CREDITORS' REMEDIES
AT LAW AND IN EQUITY

INCLUDING A CONSIDERATION OF THE PROVISIONS OF THE
BANKRUPTCY LAW APPLICABLE TO FRAUDULENT TRANS-
FERS AND THE REMEDIES THEREFOR, AND THE PRO-
CEDURE OF TRUSTEES IN BANKRUPTCY IN ACTIONS
EITHER IN STATE OR FEDERAL COURTS FOR
THE RECOVERY OF PROPERTY FRAUDU-
LENTLY TRANSFERRED BY THE
BANKRUPT.

By ^{linton} DEWITT C. MOORE
OF THE JOHNSTOWN (NEW YORK) BAR, AUTHOR OF "THE LAW OF CARRIERS."

IN TWO VOLUMES
VOL. I.



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PREFACE

The subject of fraudulent conveyances has been from the earliest times one of great interest to the public and to the legal profession. Notwithstanding the enlightened efforts of modern jurisprudence to remedy the evils growing out of the fraudulent acts of embarrassed, failing, or dishonest debtors and to devise means for the suppression of such practices, the reported cases involving fraudulent alienations and covinous schemes devised by debtors to defeat the just claims of their creditors are sufficient to demonstrate that this peculiar vice of society is in our day increasing rather than diminishing. The subject is, therefore, one of present and of great and far-reaching importance.

The Bankruptcy Law now in operation can hardly be said to have proved effective in ameliorating this condition of affairs, and indeed it in no way lessens the value and importance, from a professional standpoint, of the fullest understanding of the established principles and rules of law pertaining to this subject. On the contrary, the Bankruptcy Law gives an added importance to a thorough knowledge of the law of fraudulent conveyances.

The Bankruptcy Law makes a fraudulent transfer of his property by a debtor, if made within four months of the filing of a petition in bankruptcy, an act of bankruptcy, and declares such a transfer void, and if the transfer is also voidable under State laws, it may be set aside and the property or its value recovered by proper proceedings begun in the State courts, within the limitations of time fixed by the State statutes, or in the federal courts. But what is or is not a fraudulent conveyance is not determined by the Bankruptcy Law, nor are the proceedings for setting it aside or recovering the property or its value prescribed by that Act.

Hence, the general rules and principles of the law of fraudulent conveyances, the statutory law of the various States on the subject and its exposition, the methods of procedure in the State courts,

and all kindred questions, become of prime importance when a fraudulent transfer is to be dealt with. None of these questions comes properly within the province of a work on Bankruptcy, as the greater portion of the Bankruptcy Law is foreign to the subject of Fraudulent Conveyances. These views have led me to believe that this work will be a timely and possibly useful one to my professional brethren.

Briefly, the statutes and decisions concerning fraudulent conveyances to defeat creditors, from that landmark of our statutory law, the Statute of Elizabeth, and its exposition, to the present time, have been reviewed, and the law and the practice thereunder fully, accurately, and concisely stated. The recent decisions, in which the fundamental principles of the law are applied to the facts which reflect present day conditions and the skill, cunning, and ingenuity of fraudulent debtors in devising new schemes and methods for the cover of fraudulent transactions, have also been collated, and given precedence in the citations as, perhaps, the most valuable, being on some questions controlling, because they are the latest.

I, however, present the result of my labors with hesitancy, knowing that, as it must necessarily fall short of one's ideal, it cannot escape the criticisms of the exacting for any shortcomings which it may reveal. But, with the consciousness of having made it as accurate, full, and complete as the time which I could give to the work and the ability which I had to bestow upon it would permit, I submit it to the consideration of the profession, trusting that it may be well received and serve a useful purpose.

Johnstown, N. Y., June 1, 1908.

DEWITT C. MOORE.

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FRAUDULENT CONVEYANCES

CHAPTER I.

FRAUDULENT CONVEYANCES GENERALLY.

- Section 1. No positive definition of fraud.
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Section 1. No positive definition of fraud.—Philosophy teaches with great force the fact that complete definitions can be given only of things abstract and theoretical, such as concepts in geometry, or physics, or formal logic. Definitions in law are always extremely difficult, and the greatest jurists of all times, the ancient Romans, have laid down the rule that “all definitions are dangerous (*omnis definitio periculosa*).” The difficulty of defining what is fraud, or what is a fraudulent conveyance, becomes more apparent when we consider that the questions are not pure questions of law, but of fact or of mixed law and fact, and requiring for their determination inferences of facts not

found.¹ The danger of defining fraud or a fraudulent conveyance, by laying down any definite rule as to the precise nature of it, or by formulating rules by the application of which the presence of fraud may be detected, lies in the fact that the craft of men is likely to find ways of committing fraud which might escape the limits of such a rule or definition, and hence, it is part of the equity doctrine of fraud not to define it.² Evidently there can be no fraud in law or in fact without a breach of some legal or equitable duty.³ Fraud has, therefore, been said to include all acts, omissions or concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed and are injurious to another, or by which an undue or unconscientious advantage is taken of another.⁴ The unlawful appropriation of another's property, with knowledge, by design, and without criminal intent,⁵ or the intention to prevent creditors from recovering their just debts by an act which withdraws the property of a debtor from their reach,⁶ alike constitute actual or positive fraud, or fraud in fact. There may be legal or constructive fraud, or fraud in law, where no actual fraudulent intent is proved, but in such cases the law presumes fraud, because it is a necessary consequence of some established act. In other words, fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it, independently of the motive of the actor. This principle is illustrated where an insolvent debtor makes a gift of his property.⁷ But a creditor cannot complain that a debtor is giving away his property

1. *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; *Smith v. Craft*, 123 U. S. 436. See Questions for jury; questions of law and fact, chap. XVIII, §§ 4-10, *infra*.

2. *Bouv. L. Dict.*, vol. 1, p. 613. Fraud is "so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade." *Shoemaker v. Cake*, 83 Va. 5.

3. *Delaney v. Valentine*, 154 N. Y. 692, 704, 49 N. E. 65.

4. *Bouv. L. Dict.*, vol. 1, p. 613; *Bunn v. Ahl*, 29 Pa. St. 390.

5. *Bouv. L. Dict.*, vol. 1, p. 612.

6. *McKibbin v. Martin*, 64 Pa. St. 356, 3 Am. Rep. 588.

7. *Delaney v. Valentine*, 154 N. Y. 692, 704, 49 N. E. 65. See *Fraudulent intent and knowledge*, chap. XIII; preferences, chap. XI, *infra*. Fraud in law consists in acts which, though not

unless he can show that the gift produces insolvency, and is made to defraud creditors.⁸ Whenever fraud occurs it vitiates the transaction tainted by it.⁹ Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.¹⁰ "Fraud," said Justice Story, "will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void."¹¹ It is the judgment of law on facts and intents.¹² Its existence is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted.¹³ The rule is universal, whatever fraud creates, justice will destroy.¹⁴

§ 2. What constitutes a fraudulent conveyance.—A fraudulent conveyance has been defined to be a conveyance, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it.¹⁵ To constitute a disposition of his property by a debtor with intent to defraud his creditors three things must concur: first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and

fraudulently intended, yet as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588.

8. *Rogers v. Dimon*, 106 Ill. App. 201. See Financial condition of grantor, chap. VII; effect of want of consideration, chap. VIII, *infra*.

9. *Fenner v. Dickey*, 1 Flippin, 36.

10. *Rex v. Duchess of Kingston*,

20 How. St. Tr. 544, 2 Smith Lead. Cas. 687.

11. *United States v. Anistad*, 15 Pet. (U. S.) 594.

12. *Sturtevant v. Ballard*, 9 Johns. (N. Y.) 342; *Pettibone v. Stevens*, 15 Conn. 26; *Morgan v. Elam*, 4 Yerg. (Tenn.) 438; *Otley v. Manning*, 9 East, 64.

13. *Belford v. Crane*, 16 N. J. Eq. 265.

14. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 190.

15. 2 Kent, Comm. 440; 4 *id.* 462; *Bouv. L. Dict.*, vol. 1, p. 615; 1 Story Eq., §§ 349, 352; *McKibbin v. Martin*, 64 Pa. St. 352.

third, this must be done with intent to defraud.¹⁶ Or, as it has been stated in another form, to constitute a fraudulent conveyance within the meaning of the statute, there must, as a rule, exist a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property which is appropriable by law to the payment of the debt due.¹⁷ A conveyance to be fraudulent must be devised of malice, fraud, covin, collusion, or guile.¹⁸ Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions, that is made and received for the purpose of warding off other creditors.¹⁹ Whether the contract be oral or in writing; whether executed by the parties with all the solemnities of deeds by seal and acknowledgment; whether in form of the judgment of a court, stamped with judicial sanction, or carried out by the device of a corporation organized with all the forms and requisites demanded by the statute in that regard, if it be contaminated with the vice of fraud, the law declares it to be a nullity. Deeds, obligations, contracts, judgments, and even corporate bodies may be the instruments through which parties may obtain the most unrighteous advantages. All such devices and instruments have been resorted to to cover up fraud, but whenever the law is invoked all such instruments are declared nullities; they are a perfect dead letter; the law looks upon them as if they had never been executed. They can never be justified or sanctified by any new shape or cover, by forms or recitals, by covenants or sanctions which the ingenuity, or skill, or genius of the rogue may devise.²⁰ A fraudulent transfer, however perfect in form, is void as to creditors.²¹ The use of sheriff's deeds and other legal instruments to effect a fraudulent convey-

16. Hoyt v. Godfrey, 88 N. Y. 669, where a debtor cancelled upon his books, without consideration, an old account against one who was insolvent, the transaction did not amount to a disposition of property with intent to defraud creditors; Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 224.

17. O'Connor v. Ward, 60 Miss. 1036.

18. United States v. United States Bank, 8 Rob. (La.) 262.

19. Hughes v. Cory, 20 Iowa, 405.

20. Booth v. Bunce, 33 N. Y. 139, 156, 88 Am. Dec. 372.

21. Skowhegan Bank v. Cutler, 49 Me. 318.

ance of property by a debtor is no bar to its avoidance.²² The transfer of property for a valuable consideration may be made the cover for fraudulent practices. Exchanges by which one kind of property is converted into another more easily concealed or transported; the incumbrance of visible and unavailable property, and the retention of that which is convertible, or even the reverse of this, and other cases, where the aggregate value of the debtor's property is not diminished, but an apparent obstacle to a creditor's proceeding is created, are among the methods by which frauds may be perpetrated by an insolvent debtor. Such transactions are in fact fraudulent and condemned by the statute.²³ Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors, even though a full and adequate consideration be received for the same.²⁴

§ 3. **Tests as to fraudulent conveyances.**—The tests as to whether a conveyance is fraudulent and void as to creditors or not in every case, except in the case of voluntary conveyances in certain jurisdictions, are whether the conveyance was a *bona fide* transaction, or whether it was a trick and contrivance to defeat creditors,²⁵ whether it hinders creditors in enforcing their debts and deprives them of a right which would be legally effective, had the conveyance or device not been resorted to,²⁶ or whether it secures or reserves to the grantor some benefit or advantage inconsistent with its avowed purpose, or an unusual indulgence, at the expense of creditors, or by which creditors are prevented from

22. *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535. See also *Collusive and fraudulent legal proceedings*, chap. II, § 9, *infra*.

23. *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; *Pettit v. Shepherd*, 5 Paige (N. Y.) 493, 501, 28 Am. Dec. 437.

24. *Greenwald v. Wales*, 174 N. Y. 140, 144; *Billings v. Russell*, *supra*; *Starin v. Kelly*, 88 N. Y. 421. See

also *Consideration*, chap. XIII, § 30, *infra*.

25. *United States v. Hooe*, 3 Cranch, 73; *Cadogan v. Kennett*, 2 Cowp. 432; 2 Story Eq. Jur. § 353. See also *Fraudulent intent and knowledge*, chap. XIII; *Retention of possession or apparent title*, chap. XII; *Reservations and trusts for grantor*, chap. X.

26. *Salzenstein v. Hettrick*, 105

compelling an immediate appropriation of the debtor's property to the payment of his debts.²⁷ Whether a conveyance is fraudulent or not as against creditors depends on whether it was made on good consideration and *bona fide*. It is not enough that it be on good consideration or *bona fide*; it must be both. If defective in either respect, although valid between the parties and their representatives, it is voidable as to creditors.²⁸ In order that a transaction may be attacked as fraudulent as to creditors, however, prejudice to the rights of creditors must result therefrom.²⁹ Fraud is always a question of fact with reference to the intent of the grantor and every case depends upon its circumstances. The vital question is always the good faith of the transaction. There is no other test.³⁰

§ 4. **Characteristics of fraud.**—Fraud has various characteristics. It may be passive as well as active.³¹ Fraud does not consist in mere intention, but in intention carried out by hurtful acts.³²

Ill. App. 99; *Wagner v. Smith*, 81 Tenn. 569.

27. *N. Y.*—*Young v. Heermans*, 66 N. Y. 374.

Ga.—*Mitchell v. Stetson*, 64 Ga. 442; *Edwards v. Stinson*, 59 Ga. 443.

Me.—*Graves v. Blondell*, 70 Me. 190.

Minn.—*Henry v. Hinman*, 25 Minn. 199.

Miss.—*Thompson v. Furr*, 57 Miss. 478.

Mo.—*Monarch Rubber Co. v. Bunn*, 78 Mo. App. 55.

Pa.—*Bentz v. Rockey*, 69 Pa. St. 71.

Eng.—*Alton v. Harrison*, L. R. 4, Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; *Natha v. Maganchand*, 27 Indian Law Rep. 327, the test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor.

28. *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Basey v. Daniel, Smith (Ind.)*, 252; *Glenn v. Randall*, 2 Md. Ch. 220; *Smith v. Muirhead*, 34 N. J. Eq. 4; *Randall v. Vroom*, 30 N. J. Eq. 353; *Sayre v. Fredericks*, 16 N. J. Eq. 205; 1 Story Eq. Jur., § 353. See also Effect of consideration where there is fraudulent intent, chap. XIII, § 30, *infra*.

29. *Shand v. Hanley*, 71 N. Y. 319; *Scott v. Thomas*, 104 Va. 330, 51 S. E. 829. See also Prejudice to the rights of creditors, chap. III, § 9, *infra*, and cases there cited.

30. *Lloyd v. Fulton*, 91 U. S. 479, 485, 23 L. Ed. 363. See Fraudulent intent and knowledge, chap. XIII, *infra*.

31. *Holt v. Creamer*, 34 N. J. Eq. 181.

32. *Williams v. Davis*, 69 Pa. St.

It may be any kind of artifice employed by one person to deceive another by word or act,³³ conduct that operates prejudicially on the rights of others,³⁴ or withdraws the property of a debtor from the reach of his creditors.³⁵ It must be directed by the debtor against his creditors or purchasers.³⁶ Fraud may be manifestly indicated by the circumstances,³⁷ and may be established by circumstances as against the denial of the parties interested.³⁸ Intent or intention is an operation or emotion of the mind, and can usually be shown only by acts or declarations, and, as acts speak louder than words, if a party does an act which must defraud another, his declaration that he did not by the act intend to defraud is weighed down by the evidence of his own act.³⁹ Slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud; but they must be, when taken together and aggregated, when interlinked and put in proper relation to each other, inconsistent with an honest intent.⁴⁰ The law will not deduce fraud from any number of acts, each of which is lawful and innocent in itself, but one who seeks to attach a fraudulent character to such acts must go further and show that they were in fact done with a fraudulent intent and for a fraudulent purpose.⁴¹ Suspicion of fraud is not sufficient to impart notice of it, and knowledge of facts sufficient to excite the suspicions of a

21. See Accomplishment of purpose, chap. XIII, § 3, *infra*.

33. Coke Litt. 357b.

34. Bunn v. Ahl, 29 Pa. St. 390.

35. McKibbin v. Martin, 64 Pa. St. 356.

36. Metz v. Blackburn, 9 Wyo. 481, 65 Pac. 857. See Fraud directed against debtor, chap. II, § 26, *infra*.

37. Stockwell v. Stockwell, 72 N. H. 69, 54 Atl. 701. See Circumstantial evidence, chap. XVII, § 44, *infra*.

38. Ham v. Gilmore, 7 Misc. Rep. (N. Y.) 596, 28 N. Y. Supp. 126.

39. Babcock v. Eckler, 24 N. Y. 632.

40. Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

41. Warren v. Union Bank, 157 N. Y. 259, 51 N. E. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256; Warner v. Blakeman, 4 Abb. Dec. (N. Y.) 535; Goff v. Alexander, 20 Misc. Rep. (N. Y.) 498, 45 N. Y. Supp. 737; Kempner v. Churchill, 8 Wall. (U. S.) 362, 19 L. Ed. 461; Foster v. McAlester, *supra*; Engraham v. Pate, 51 Ga. 537; Wilson v. Watts, 9 Md. 356.

prudent man, or to lead a person of ordinary perception to suspect fraud, does not amount to actual notice of it.⁴² The question whether fraud exists in a transaction may be a question of law, or of fact, or one of both law and fact.⁴³ Where the facts have been ascertained by the trial court, the conclusion to be drawn from the facts so found, including the determination of the existence of constructive fraud and of a valuable consideration, is a question of law.⁴⁴

§ 5. **Circumstances establishing fraud.**—In investigations of alleged fraudulent conveyances much more latitude is allowed than in other cases and the field of circumstances investigated ought to be very wide. The intent is seldom disclosed on the face of the transaction, but is generally concealed under legal forms, and can seldom be proved by direct evidence.⁴⁵ The vermiculations of fraud are chiefly traceable by covered tracks and studious concealments.⁴⁶ It must in most cases be established by inference from a variety of facts, and all the surrounding circumstances may properly be examined.⁴⁷ Even negative evidence may some-

42. *Urdangen & Greenberg Bros. v. Doner*, 122 Iowa, 533, 98 N. W. 317. See Mere suspicion, chap. XIII, § 19, *infra*.

43. *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; *Foster v. Woodfin*, 11 Ired. (N. C.) 339; *Estwick v. Caillaud*, 5 T. R. 420. See Questions of law and fact, chap. XVIII, § 4, *infra*.

44. *Clarke v. Black*, 78 Conn. 467, 62 Atl. 757.

45. *Beuerlein v. O'Leary*, 149 N. Y. 33, 43 N. E. 417, *revq.* 28 N. Y. Supp. 1133; *Engraham v. Pate*, 51 Ga. 537. See Admissibility and relevancy of evidence, chap. XVII, § 16, *infra*.

46. *Bliss v. Couch*, 46 Kan. 400, 26 Pac. 706.

47. *U. S.*—*Humes v. Scruggs*, 94 U. S. 22, 24 L. Ed. 51; *Knowlton v. Mish*, 8 Sawy. (U. S.) 627.

Colo.—*Eversman v. Clements*, 6 Colo. App. 224, 40 Pac. 575.

Me.—*Spear v. Spear* (1903), 54 Atl. 1106.

Md.—*Atkinson v. Phillips*, 1 Md. Ch. 507.

Pa.—*McKibbin v. Martin*, 64 Pa. St. 356.

Wis.—*Winner v. Hoyt*, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257.

Eng.—*In re Holland* (1902), 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson, 259, 50 Wkly. Rep. 575; *Thompson v. Webster*, 28 L. J. Ch. 700, 7 Wkly. Rep. 648, *affd.* 4 Drew, 628, 5 Jur. N. S. 668, 28 L. J. Ch. 700, 7 Wkly. Rep. 596.

times have a positive value in cases of fraud.⁴⁸ Every case depends upon its circumstances and is to be carefully scrutinized.⁴⁹ It is upon these and like considerations that courts have held that "the case of fraud is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge."⁵⁰ Fraud implies a fraudulent intent, and is an inference or conclusion of fact drawn from the facts or circumstances of the particular transaction. The circumstances to show fraud, and the circumstances to rebut it, are arguments on the question of fraud, and a conclusion on the question of fraud is a conclusion of fact arrived at by weighing those arguments.⁵¹ The evidence of fraud is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony.⁵² And if the facts and circumstances surrounding the case, and distinctly proven, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof that the law requires.⁵³ The general subject of evidence pertaining to fraudulent conveyances will be considered in a later chapter.⁵⁴

§ 6. Origin of written law against fraudulent conveyances.—

Certain provisions in Magna Charta, the Great Charter of English liberties, so called, but which was really a compact between the king and his barons, and almost exclusively for the benefit of the latter, though confirming the ancient liberties of Englishmen in some few particulars, are sometimes referred to as one of the original sources of written law against covinous alienations of

48. *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 19 Sup. Ct. 233, 43 L. Ed. 492.

49. *Lloyd v. Fulton*, 91 U. S. 485.

50. *Beuerlein v. O'Leary*, *supra*; *Cary v. Hotaling*, 1 Hill (N. Y.), 311, 37 Am. Dec. 311.

51. *Babcock v. Eckler*, 24 N. Y. 623.

52. *Warner v. Blakeman*, 4 Abb.

App. Dec. (N. Y.) 535; *Newman v. Cordell*, 43 Barb. (N. Y.) 456; *Kempner v. Churchill*, 8 Wall. (U. S.) 369; *Tumlin v. Crawford*, 61 Ga. 128; *Hamett v. Dundass*, 4 Pa. St. 181.

53. *White v. Perry*, 14 W. Va. 86; *Lockhard v. Beckley*, 10 W. Va. 87.

54. See chap. XVII, *infra*.

property. They provided that no freeman should give or sell away his lands so that no residue would remain to the lord of the fee, out of which the service pertaining to the fee might be enforced, and that a gift of lands in *mortmain* should be void and lands so given go to the lord of the fee.⁵⁵

§ 7. Early English statutes avoiding fraudulent conveyances.

The famous statute of 13 Elizabeth (1570), perpetuated by the statute of 29 Elizabeth (1587), was preceded by earlier legislation by the parliament of England against fraudulent transfers, enacted to more clearly formulate the common law with a view to suppress voluntary conveyances and secret trusts made by debtors who escaped arrest for debt, or avoided service of process by fleeing to sanctuaries or holy ground. The statute of Edward I,⁵⁶ the statute of Richard II,⁵⁷ and the statute of Edward III,⁵⁸

55. Magna Charta, chapters 32 and 36, June 19, 1215.

56. St. 13 Edward I, chap. 1, enacted in 1290.

57. St. 2 Richard II, chap. 3, enacted in 1379. This statute reads as follows. "item, *in case of debt*, where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and after withdraw themselves, and flee into places of holy church privileged, and there hold them a long time, and take the profit of their said lands and goods so given by fraud and collusion, whereby their creditors have been long and yet be delayed of their debts and recovery, wrongfully and against good faith and reason; it is ordained and established, that after that the said creditors have thereof brought their writs of debt, and thereupon a *capias* awarded, and the sheriff shall make his return that he hath not taken the said persons because of such places

privileged in which they be or shall be entered, then . . . another writ shall be granted . . . that proclamation be made openly at the gate of the place so privileged, where such persons be entered, by five weeks continually, every week once, that the same persons be at a certain day, . . . before the King's justices, and . . . if the said persons called come not . . . judgment shall be given against them upon the principal for their default. . . . Execution shall be made of their goods and lands, being out of the place privileged, as well, that is to say, of those lands and goods so given by collusion, as of any other out of the same franchise, after that such collusion or fraud be duly found in the same manner as that ought to have been, if no devise had been thereof made, notwithstanding the same devise."

58. St. 50 Edward III, chap. 6, enacted in 1376.

contained provisions aimed at fraudulent debtors. The latter act read as follows: "Divers people . . . do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." By the statute of Henry VII "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift," are declared "void and of none effect."⁵⁹ These early statutes show that fraud, which was greatly abhorred by the common law, was so much practiced by debtors upon creditors as to call forth frequent legislation in those early times, and that fraudulent conveyances by debtors are not an outgrowth of modern civilization, although more prevalent in more recent times and at the present day.

§ 8. Statute of 13 Elizabeth for the protection of creditors.—The most important of the English statutes against fraudulent conveyances is the justly celebrated act of 13 Elizabeth,⁶⁰ perpetuated by the statute of 29 Elizabeth.⁶¹ This statute was passed for the protection of creditors. By its provisions all conveyances and dispositions of property, real or personal, made with the intention of defrauding creditors, are declared null and void as against creditors.⁶² The leading object of the statute was to prevent those

59. St. 3 Hen. VII, chap. 4, enacted in 1487.

60. St. 13 Eliz., chap. 5, enacted in 1570.

61. St. 29 Eliz., chap. 5, enacted in 1587.

62. Drake v. Rice, 130 Mass. 410.

The statute declares that "all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or of any of them, or of any Lease, Rent, Common or other Profit or Charge out of the

collusive transfers of the legal ownership which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of that which ought in conscience to be open to their legal remedies.⁶³

§ 9. Statutes in the United States.—The statute of 13 Elizabeth, c. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject,⁶⁴ and either re-enacted in terms, or nearly so, or with some change of language, by the legislatures of practically all the states, or recognized as an exposition of the principles of the common law and, although not re-enacted, adopted as and held to be a part of the common law in force here.⁶⁵ In Iowa, for example, although the statutes of 13 Elizabeth and 27 Elizabeth

same Lands, Tenements, Hereditaments, Goods and Chattels, or any of them, by Writing or otherwise, and all and every Bond, Suit, Judgment and Execution, at any Time had or made sithence the Beginning of the Queen's Majesty's Reign that now is, or at any Time hereafter to be had or made, to or for any Intent or Purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them, whose Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, by such guileful, covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none Effect; any Pretence, Colour, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding."

63. Roberts on Fraud. Conv., p. 554.

64. Story Eq. Jur., § 353.

65. *N. Y.*—Hall v. Tuttle, 8 Wend. 375; Sands v. Hildreth, 14 Johns. 493; Jackson v. Henry, 10 Johns. 185; Sturtevant v. Ballard, 9 Johns. 337.

U. S.—Peters v. Bain, 133 U. S. 670, 685, 10 Sup. Ct. 354, 33 L. Ed. 696; Clement v. Nicholson, 6 Wall. 299, 18 L. Ed. 786; Sumner v. Hieks, 2 Black, 532, 17 L. Ed. 355; Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120; Hamilton v. Russell, 1 Cranch, 309, 2 L. Ed. 118; McClellan v. Pyeatt, 66 Fed. 843, 14 C. C. A. 140.

Ala.—Anderson v. Anderson, 64 Ala. 403.

D. C.—Kansas City Packing Co. v. Hoover, 1 App. Cas. 268.

Ga.—Westmoreland v. Powell, 59 Ga. 256; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Ill.—Ewing v. Runkle, 20 Ill. 448.

Ky.—Doyle v. Sleeper, 31 Ky. (1 Dana) 531.

La.—United States v. United States Bank, 8 Rob. 262, 402.

had never been legislatively re-enacted, it was said by Judge Dillon: "But antedating as these statutes do the settlement of this country, and being mainly, if not wholly, declaratory of the common law, which sets a face of flint against frauds in every shape, they constitute the basis of American jurisprudence on these subjects, and are, in this state, part of the unwritten law."⁶⁶

§ 10. Statutes merely declaratory of the common law.—That the famous statutes of Elizabeth and other early statutes were merely declaratory of rules and principles which existed and were applied at common law before these statutes against fraudulent conveyances were enacted, and by which all conveyances made in fraud of creditors were regarded as voidable at the instance and suit of such creditors, is generally conceded.⁶⁷ It was said

Me.—Butler v. Moore, 73 Me. 151, 40 Am. Rep. 348; Whitmore v. Woodward, 28 Me. 392; Howe v. Ward, 4 Me. 195.

Md.—Crooks v. Brydon, 93 Md. 640, 49 Atl. 921.

Miss.—Carlisle v. Tindall, 49 Miss. 229, 234.

N. H.—Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

N. J.—Mulford v. Peterson, 35 N. J. L. 127.

N. C.—Moore v. Hinnant, 89 N. C. 455; Gowing v. Rich, 23 N. C. 553.

Pa.—Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533; Clark v. Douglass, 62 Pa. St. 408; McCulloch v. Hutchinson, 7 Watts, 434, 32 Am. Dec. 776; Wilt v. Franklin, 1 Binn. 502, 2 Am. Dec. 474.

Va.—Davis v. Turner, 4 Gratt. 422.

Wash.—Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Wagner v. Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

⁶⁶ Gardner v. Cole, 21 Iowa, 205.

⁶⁷ *N. Y.*—Curtis v. Leavitt, 15

N. Y. 9, 124; Heroy v. Kerr, 2 Keyes, 582, 2 Abb. Dec. 359; Nellis v. Clark, 20 Wend. 24; Sturtevant v. Ballard, 9 Johns. 337, 6 Am. Dec. 281. Compare Delaney v. Valentine, 154 N. Y. 692, 49 N. E. 65.

U. S.—Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065; Clements v. Nicholson, 6 Wall. 299, 18 L. Ed. 786; Sumner v. Hicks, 2 Black, 532, 17 L. Ed. 355; Hamilton v. Russel, 1 Cranch, 309, 2 L. Ed. 118; Meeker v. Wilson, 16 Fed. Cas. No. 9,392, 1 Gall. 419.

Ala.—Anderson v. Anderson, 64 Ala. 403; Adams v. Broughton, 13 Ala. 731; Anderson v. Hooks, 9 Ala. 704; Cato v. Easley, 2 Stew. 214; Killough v. Steele, 1 Stew. & P. 262.

Conn.—Fox v. Hillis, 1 Conn. 295.

Ga.—Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Ill.—Ewing v. Runkle, 20 Ill. 448, 461.

Iowa.—Gardner v. Cole, 21 Iowa, 209.

Kan.—Diefendorf v. Oliver, 8 Kan. 365.

by Lord Mansfield, in an early English case, that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 Elizabeth, c. 5, and 27 Elizabeth, c. 4."⁶⁸ And Chancellor Kent early asserted the American view that the "statute of Elizabeth" was "only in affirmance of the principles of the common law."⁶⁹ The right of a creditor to subject property of his debtor, fraudulently conveyed, was said in a later American case to be "founded on that principle of the common law which enjoins integrity as a virtue paramount to generosity."⁷⁰ The statutes against fraudulent conveyances are, therefore, merely declaratory of principles which the courts would enforce independently of their enactment, and are to be construed in the light of those principles.⁷¹

§ 11. Statute of 27 Elizabeth in favor of subsequent purchasers.—The statute of 27 Elizabeth was enacted in favor of purchasers, and renders void as against subsequent purchasers of the same land all conveyances, etc., made with the intention of defeating them, or containing a power of revocation.⁷² This

Ky.—Doyle v. Sleeper, 1 Dana, 531; Lillard v. McGee, 4 Bibb. 166.

Mass.—*In re Jordan*, 9 Metc. 292.

Minn.—Blackman v. Wheaton, 13 Minn. 326; Piper v. Johnston, 12 Minn. 60.

N. H.—Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

N. C.—O'Daniel v. Crawford, 15 N. C. 197.

Ohio.—Brice v. Myers, 5 Ohio, 121.

Pa.—Clark v. Douglass 62 Pa. St. 408, 416; McCulloch v. Hutchinson, 7 Watts, 434, 32 Am. Dec. 776.

S. C.—Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Teasdale v. Atkinson, 2 Brev. 48; Footman v. Pendergrass, 3 Rich. Eq. 33.

Va.—Davis v. Turner, 4 Gratt. 422.

Eng.—Notes to Twyne's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1, continued in 18 Am. L. Reg. N. S. 137.

68. Cadogan v. Kennett, 2 Cowp. 432. See Starin v. Kelly, 88 N. Y. 421; Clements v. Moore, 6 Wall. (U. S.) 299.

69. Sands v. Codwise, 4 Johns. (N. Y.) 596, 4 Am. Dec. 313.

70. Planters', etc., Bank v. Walker, 7 Ala. 926, 946.

71. Seymour v. Wilson, 19 N. Y. 417.

72. St. 27 Eliz., chap. 4, provided in substance, in section 2, that every conveyance, grant, charge, lease,

statute which, like the statute of 13 Elizabeth, has been held to be merely declaratory of the common law, has been either substantially re-enacted in the United States, or recognized as a part of the common law.⁷³ This statute and some of the statutes in the United States based upon it are in terms limited to conveyances

estate, encumbrance and limitation of use or uses of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall in fee simple, fee tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, encumbered, or limited in use, or to defraud and deceive such as shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit or commodity in or out of the same, to be utterly void, frustrate, and of none effect; any pretense, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding. Section 4 excepts conveyances, etc., had or made upon or for good consideration and *bona fide*. Section 5 avoids conveyances containing a power of revocation. Section 6 provides that the act shall not

avoid any lawful mortgage made *bona fide* and upon good consideration.

By 56 and 57 Vict., chap. 21, an act to amend the law relating to voluntary conveyances, such conveyances if *bona fide* are not to be avoided under 27 Eliz., chap. 4, saving transactions completed before the passing of the act.

73. *N. Y.*—Jackson v. Henry, 10 Johns. 185, 6 Am. Dec. 328.

U. S.—Cathcart v. Robinson, 5 Pet. 280, 8 L. Ed. 120.

Ala.—Sewall v. Glidden, 1 Ala. 52; Killough v. Steele, 1 Stew. & P. 262.

Fla.—Gibson v. Love, 4 Fla. 217.

Ga.—Harper v. Scott, 12 Ga. 125; Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318.

Ind.—Anderson v. Etter, 102 Ind. 115, 26 N. E. 218; Pence v. Croan, 51 Ind. 336.

Iowa.—Gardner v. Cole, 21 Iowa, 205.

Md.—Cooke v. Kell, 13 Md. 469; Baltimore v. Williams, 6 Md. 235.

N. J.—Mulford v. Peterson, 35 N. J. L. 127; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402.

N. C.—Garrison v. Brice, 48 N. C. 85; Hiatt v. Wade, 30 N. C. 340.

S. C.—Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Teasdale v. Atkinson, 2 Brev. 48; Footman v. Pendergrass, 3 Rich. Eq. 33.

Eng.—Cadogan v. Kennett, 2 Cowp. 432. See also Subsequent purchaser, chap. V, § 22, *infra*.

of real property, and have been held in many jurisdictions not to extend to transfers of personal property.⁷⁴ Other cases have held that, since the statute is declaratory of the common law, and the common law applies to personal property, it may be interpreted as defining the nature and effect of fraudulent conveyances generally, notwithstanding it in terms applies only to land.⁷⁵

§ 12. **Construction or interpretation of statutes.**—The statutes of 13 Elizabeth and other statutes, protecting creditors and others from fraudulent conveyances, are to be construed equitably and liberally, and have always had a liberal interpretation by the courts, for the prevention of frauds and in favor of the class of persons designed to be protected from such frauds. The term “creditor” has not received a restricted or limited interpretation.⁷⁶ It was said in *Twyne’s case* that “because fraud and deceit abound in these days more than in former times . . . all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.”⁷⁷ The law, which “loves honesty and fair

74. *Ala.*—*Sewall v. Glidden*, 1 *Ala.* 52.

Md.—*Bohn v. Headley*, 7 *Harr. & J.* 257.

N. J.—*Boice v. Conover*, *supra*.

N. C.—*Garrison v. Brice*, 48 *N. C.* 85; *Hiatt v. Wade*, 30 *N. C.* 340, growing grass is real property and within 27 *Eliz.* and similar statutes.

S. C.—*Teasdale v. Atkinson*, 2 *Brev.* 48.

Eng.—*Jones v. Croucher*, 1 *Sim. & St.* 315, 1 *Eng. Ch.* 315, 57 *Eng. Reprint*, 128.

75. *Gibson v. Love*, 4 *Fla.* 217; *Harper v. Scott*, 12 *Ga.* 125; *Fleming v. Townsend*, 6 *Ga.* 103, 50 *Am. Dec.* 318; *Avery v. Wilson*, 47 *S. C.* 78, 25 *S. E.* 286; *Hudnal v. Wilder*, *supra*.

76. *N. Y.*—*Young v. Heermans*, 66 *N. Y.* 374, 383.

Ala.—*Anderson v. Anderson*, 64 *Ala.* 403.

Conn.—*Allen v. Rundle*, 50 *Conn.* 9, 47 *Am. Rep.* 599.

Fla.—*Gibson v. Love*, 4 *Fla.* 217.

Ga.—*Peck v. Land*, 2 *Ga.* 1, 46 *Am. Dec.* 368.

Md.—*Spuck v. Logan*, 97 *Md.* 152, 54 *Atl.* 989, 99 *Am. Rep.* 427; *Welde v. Scotten*, 59 *Md.* 72; *Cooke v. Cooke*, 43 *Md.* 522.

Miss.—*Pennington v. Seal*, 49 *Miss.* 518.

Ohio.—*Brice v. Myers*, 5 *Ohio*, 121.

Eng.—*Gooch’s Case*, 5 *Coke*, 60a; *Wimbish v. Tailbois*, *Plowd.* 38a. See also, as to liberal construction of the term “creditor,” chap. V, *infra*.

77. 3 *Coke*, 80a, 82a, 1 *Smith Lead. Cas.* 1.

dealing," construes liberally statutes to suppress frauds, so far as they annul the transaction.⁷⁸ The statutes on this subject are liberally expounded for the protection of creditors, and to meet the schemes and devices by which a fair exterior may be given to that which is in reality collusive.⁷⁹ In the federal courts, the construction placed upon the statute by the highest courts of the state are considered as controlling.⁸⁰ A statutory provision on the subject of fraudulent conveyances, where it establishes a rule of property and not merely a rule of procedure or evidence, will not operate retrospectively so as to apply to conveyances made before its enactment.⁸¹ But statutes which merely affect the remedy may be given a retrospective effect.⁸²

§ 13. **Effect of subsequent statutory provisions.**—The effect of a later statute upon a prior statute concerning fraudulent conveyances depends upon the intention of the legislature, and, as a rule, where the statutes are not inconsistent and both may stand, a repeal is not to be implied. For example, the provisions of the Georgia Code as to fraudulent conveyances are amendatory, and not in repeal, of the statute of 13 Elizabeth.⁸³ The provision of the New York statute (3 R. S. 7th ed. 2329) that every conveyance or assignment, made with the intent to hinder, delay, or

78. *Cadogan v. Kennett*, 2 Cowp. 432. "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the rule that penal statutes are to be construed strictly; most statutes against frauds being in their consequences penal. But this difference is here to be taken; where the statute acts upon the offender and inflicts a penalty, as a pillory or a fine, it is then to be taken strictly; *but when the statute acts upon the offense*, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Com. 88.

79. *McCulloch v. Hutchinson*, 7 Watts (Pa.), 434, 32 Am. Dec. 776.

80. *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; *Jaffray v. McGehee*, 107 U. S. 361, 2 Sup. Ct. 367, 27 L. Ed. 495; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Allen v. Massey*, 17 Wall. (U. S.) 351, 21 L. Ed. 542; *Sumner v. Hicks*, 2 Black (U. S.), 532, 17 L. Ed. 355.

81. *McClellan v. Pyeatt*, 66 Fed. 843, 14 C. C. A. 140; *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1095.

82. *Stanton v. Keyes*, 14 Ohio St. 443.

83. *Westmoreland v. Powell*, 59 Ga. 256.

defraud creditors, is void, is still in force and operation, notwithstanding the act of 1858 and the various acts relating to voluntary assignments for the benefit of creditors, and an assignment made with such fraudulent intent may be set aside at the suit of judgment creditors.⁸⁴ The New York act of April 29, 1833, relating to the filing of chattel mortgages, did not repeal the statute concerning fraudulent conveyances. It only added another to the grounds on which a mortgage of personal property will be declared void.⁸⁵ But where the provisions of the two statutes are inconsistent, or where it appears that the legislature intended the later statute to cover the whole subject, there is an implied repeal.⁸⁶

§ 14. **Twyne's case.**—The leading case under the statute of 13 Elizabeth is Twyne's case, a decision promulgated in 1601, thirty years after the enactment of the statute. Its interpretation of the statute and clear exposition of the rules governing fraudulent conveyances have gained for it equal prominence with the statute itself, and it is relied upon as an authority and precedent, and is perhaps as widely cited as any decision extant. It and the statute which it expounds are regarded as distinctive landmarks in the law. The conveyance or transfer of his property by the debtor in this case was adjudged to be fraudulent within the statute, and the signs and marks were stated by the court to be: (1) That the gift was general, without exception of the donor's apparel, or of anything of necessity; (2) the donor continued in possession and used the goods as his own, and by means thereof traded with others, and defrauded and deceived

⁸⁴ *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 259.

⁸⁵ *Otis v. Sill*, 8 Barb. (N. Y.) 102.

⁸⁶ *Vance v. Campbell*, 3 Ky. L. Rep. 448, the act of 1838, authorizing a suit in equity by a creditor to set aside a fraudulent conveyance,

"whether his debt be or be not due, or be or be not in judgment," was repealed by Gen. St., chap. 44, § 1, defining fraud as to creditors, and by Civ. Code, §§ 194, 439, allowing attachment of property fraudulently conveyed, either on the giving of a bond or without bond on return of *nulla bona*.

them; (3) it was made in secret; (4) it was made pending the writ; (5) there was a trust between the parties, for the donor possessed all and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud; and (6) the deed expressed that the gift was made honestly, truly, and *bona fide*; *et clausula inconsueta semper inducunt suspicionem*.⁸⁷ Although the leading doctrine of this case has been practically superseded in England by the statute providing that a voluntary conveyance if made in good faith shall not be avoided,⁸⁸ the principles of the case are of very general application in the United States and hold a prominent place in our jurisprudence.⁸⁹ The principles of this celebrated decision have since been extended, as will appear in subsequent chapters, so as to avoid fraudulent conveyances in certain cases as to subsequent creditors,⁹⁰ contingent subsequent creditors,⁹¹ creditors suing the debtor for tort,⁹² as for assault and battery,⁹³ libel and slander,⁹⁴ or the misapplication of trust funds.⁹⁵ The doctrines of this case have also been enlarged so as to apply to fraudulent transfers of

87. *Twyne's Case*, 3 Coke, 80a, 1 Smith Lead. Cas. 1, 18 Am. L. Reg. N. S. 137. See also *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368. Compare *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; *Kidd v. Rawlinson*, 2 B. & P. 59, 3 Esp. 52, 5 Rev. Rep. 540. See also *Badges of Fraud*, chap. VI, *infra*.

88. St. 56 and 57 Vict., chap. 21.

89. *Davis v. Schwartz*, *supra*. See also *Effect of want of consideration*, chap. VIII, §§ 32-35, *infra*.

90. *Laughton v. Harden*, 68 Me. 212; *Day v. Cooley*, 118 Mass. 527. See also *Subsequent creditors*, chap. V, § 3, *infra*.

91. *Jackson v. Seward*, 5 Cow.

(N. Y.) 71; *Pennington v. Seal*, 49 Miss. 525; *Hoffman v. Junk*, 51 Wis. 614. See also *Contingent obligations*, chap. V, § 2, *infra*.

92. *Fox v. Hills*, 1 Conn. 295; *Walradt v. Brown*, 6 Ill. 397; *Weir v. Day*, 57 Iowa, 87; *Gebhart v. Mersfeld*, 51 Md. 525; *Post v. Stiger*, 29 N. J. Eq. 558; *Langford v. Fly*, 26 Tenn. 585. See also *Torts*, chap. V, § 9, *infra*.

93. *Ford v. Johnston*, 7 Hun (N. Y.), 563; *Slater v. Sherman*, 68 Ky. 206.

94. *Wilcox v. Fitch*, 20 Johns. (N. Y.) 472; *Jackson v. Myers*, 18 Johns. (N. Y.) 425; *Cooke v. Cooke*, 43 Md. 522.

95. *Strong v. Strong*, 18 Beav. 408, 52 Eng. Reprint, 161.

intangible rights and choses in action,⁹⁶ such as corporate stock,⁹⁷ annuities,⁹⁸ life insurance policies,⁹⁹ and insurance premiums,¹ legacies,² an equity of redemption,³ and alimony granted to a wife under a judgment for divorce.⁴ The principal badges and evidences of fraud were indicated in this case, however, and the controlling principles and rules in the determination of the various phases of fraudulent conveyances are in great measure derived from this source.

§ 15. **Prevalence of fraudulent transfers.**—The prevalence of fraudulent conveyances early led, as we have seen, to statutory enactments on the subject, in the effort to discourage and prevent fraudulent debtors from seeking to cover up their property from their creditors. But the tendency of legislation for the last century has almost uniformly been in favor of the poor but honest debtor, and the object of nearly every law upon the subject has been to discourage and discountenance, or entirely prevent, the efforts of unfeeling creditors to oppress and punish him for his poverty.⁵ The Debtors Act of 1869, in England, and the general abolition of imprisonment for contract debts in the different states of our own country were humane reforms in the law, inspired by the desire to relieve honest, but unfortunate, debtors from the painful consequences formerly incident to insolvency. But the disgrace and horrors of the debtor's prison being re-

96. *Greenwood v. Brodhead*, 8 Barb. (N. Y.) 597; *Drake v. Rice*, 130 Mass. 410. See Choses in action, chap. IV, § 7, *infra*.

97. *Hadden v. Spader*, 20 Johns. (N. Y.) 554; *Bayard v. Hoffman*, 4 Johns. Ch. (N. Y.) 450; *Weed v. Pierce*, 9 Cow. (N. Y.) 723; *Edmeston v. Lyde*, 1 Paige (N. Y.) 641; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Beckwith v. Burroughs*, 14 R. I. 366.

98. *Norcutt v. Dodd*, 1 Cr. & Ph. 100, 41 Eng. Reprint, 428.

99. *Aetna Nat. Bank v. Manhattan Life Ins. Co.*, 24 Fed. 769; *Burton v. Farinholt*, 86 N. C. 260; *Stokoe v. Cowan*, 29 Beav. 637. See Life insurance, chap. IV, § 20, *infra*.

1. *Aetna Nat. Bank v. United States Life Ins. Co.*, 24 Fed. 770.

2. *Bigelow v. Ayrault*, 46 Barb. (N. Y.) 143.

3. *Sims v. Gaines*, 64 Ala. 397.

4. *Stevenson v. Stevenson*, 34 Hun (N. Y.) 157.

5. *Stevens v. Merrill*, 41 N. H. 315.

moved by this radical change in remedies, and the personal liberty of the debtor being no longer endangered, the most effective preventive of fraudulent conveyances by dishonest and unscrupulous insolvents was removed, with the resultant effect that fraudulent conveyances have increased in both England and the United States, and the ability of creditors to enforce payment of their just obligations from this class of debtors has proportionately diminished. The ingenuity of fraudulent debtors in devising schemes for colorable or covinous transfers of their property and in evading by cunning and intricate devices the payment of their just debts is remarkable, and seems to justify the observation of Balzac, some sixty years ago, that under any system of law the dishonest debtor will always on the whole come out ahead of the creditor. The perplexing problem of modern jurisprudence as to how to remedy this condition, and to neutralize or avoid, in favor of honest creditors, these fraudulent schemes and devices of the unscrupulous debtor, is to some extent further complicated by the fact that on both sides stands an unscrupulous class whose dishonesty makes misery for the honest. Money lenders and installment sharks take advantage of the law to harrow and torture the ignorant, the poor, and the friendless on the one hand, and dishonest debtors seek to swindle honest creditors on the other and evade payment of their just obligations. The statutes permitting arrest and imprisonment in civil actions for debts fraudulently contracted are a constant menace to the innocent, and are the occasion for wrongs more serious, because committed under the guise of legal process, than those which they were designed to prevent and punish. They are an outgrowth of the ancient practice of obtaining private vengeance by the punishment of fraudulent debtors. The policy of coercion by imprisonment for debt proved to be a failure because it could not be resorted to in order to reach debtors who could pay but refused to pay, without involving those who were unable to pay, and who by being kept in jail were deprived of the means of making a livelihood, and became a burden to the community. The sound and true policy of the law should be to provide the most effective means

for the discovery and subjection to the just demands of creditors of assets which have been fraudulently conveyed or transferred, by liberal provisions for attachment of property and by effective bankrupt laws. The question is one which concerns every man, debtor as well as creditor, because any man, in any walk of life, is liable to the misfortunes which arise from hard times, errors of judgment, bad ventures, sickness, the failure of others, and other causes. On the other hand the honest and confiding creditor is too often made the victim of unscrupulous and dishonest debtors who, either not having the skill and ability to acquire property honestly or lacking the inclination or disposition, seek to enrich themselves at the expense of their creditors. Creditors have an equitable interest for the payment of their claims, in their debtor's property, or the means he has of satisfying their demands, which the law recognizes and enforces, under certain circumstances,⁶ and their rights to a thorough and searching investigation as to transfers or dispositions of the debtor's property, at least to the extent of their demands, should be manifestly facilitated.

§ 16. History and comparative legislation.—The usual incident of property of every kind owned or possessed by persons *sui juris* is the right and power of alienation. As a rule, every man may in theory of law do what he pleases with that which is his own, and a debtor has the absolute power of disposing of his property and is not deprived of the control of it by mere insolvency. His debts are only personal obligations, and so long as he acts in good faith and in a manner not prohibited by law, he may deal with it as he sees fit.⁷ For centuries the tendency of the law has been in favor of the removal of old restraints on the alienation of property and the disallowance of new ones, and legislatures and courts have co-operated to this end. Almost the sole remaining restraint upon the power of alienation of land is that which exists

6. *Seymour v. Wilson*, 19 N. Y. 692, 704, 49 N. E. 65; *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 418.

7. *Delaney v. Valentine*, 154 N. Y. 145.

under the champerty laws providing that every grant of lands shall be absolutely void if at the time of the delivery such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. These statutes "were originally introduced partly upon the theory that it would be dangerous to permit the transfer of disputed or 'fighting titles,' lest powerful and influential persons might purchase and use such titles as a means of oppressing poor people." Such statutes are the relic of an ancient policy which has been treated with but little favor by either legislatures or courts in modern times, and are being steadily abolished, circumvented, or ignored as impracticable and unnecessary in this country, where no aristocracy, nor any privileged class, elevated above the mass of the people, has ever existed, and will doubtless eventually be wholly superseded.⁸ But from time immemorial there has existed in our jurisprudence a clear restraint upon a debtor's right and power of alienation of his property, where it is attempted to be exercised for the purpose of hindering, delaying, or defrauding his creditors, or defeating their lawful right to subject his property by legal process to the satisfaction of their lawful demands. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor.⁹ The debtor must devote all his property absolutely to the payment of his debts; reserve no control to himself;¹⁰ provide for no benefit to himself,¹¹ other than what may result from the payment of his debts; impose no condition upon the right of

8. *Dawley v. Brown*, 79 N. Y. 390; *Matter of Department of Parks*, 73 N. Y. 560; *Crary v. Goodman*, 22 N. Y. 177; *Sedgwick v. Stanton*, 14 N. Y. 295; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 611; *Williams v. Rawlins*, 33 Ga. 117; *McMahan v. Bowe*, 114 Mass. 145.

9. *Abbey v. Deyo*, 44 N. Y. 343.

10. *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565; *Means v. Dowd*, 128 U. S. 281; *West v. Snodgrass*, 17 Ala. 554; *Fisher v. Henderson*, 8 N. B. R. 175; *Donovan v. Dunning*, 69 Mo. 436.

11. *Lukins v. Aird*, 6 Wall. (U. S.) 79; *Wooten v. Clark*, 23 Miss. 75; *Towle v. Hoit*, 14 N. H. 61.

the creditors to participate in the fund; authorize no delay on the part of the trustee.¹² The claims of the creditors rest upon legal obligations which are paramount to the demands of affection or generosity. The debtor must be just before he is generous. He must pay before he gives.¹³ His property must not be diverted from the payment of his debts to the injury of his creditors.¹⁴ Creditors are a favored class,¹⁵ and the protection and preservation of their rights has been and is a fundamental policy of all enlightened nations.¹⁶ This fundamental principle governing the policy of all civilized nations became an established principle or rule of the common law, and was subsequently written in the statute law of England and this country. This policy of the law in favor of the creditor class existed in ancient times, as well as modern, and the debtor class was treated with greater severity under ancient laws. But while the application of the debtor's property has under the laws of all countries been rigidly applied to the payment of his debts, no country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debt.¹⁷ Under the laws of the ancient Roman republic, the insolvent debtor might be put to death, or sold into foreign slavery, or his creditors might dismember and pro-rate his body, as well as his estate. Rome, under the Emperors, however, granted a discharge to the honest insolvent.¹⁸ Even in England as late as 1663, an imprisoned

12. *Oliver Lee & Co.'s Bank v. Talcott*, 19 N. Y. 148.

13. *Abbey v. Deyo*, 44 N. Y. 343; *Wait v. Day*, 4 Den. (N. Y.) 439; *Potter v. Gracie*, 58 Ala. 303; *Sherman v. Barrett*, 1 McM. (S. C.) 147.

14. *Clements v. Moore*, 6 Wall. (U. S.) 312; *Tompkins v. Sprout*, 55 Cal. 36; *Hunters v. Waite*, 3 Gratt. (Va.) 26; *Lockhard v. Beckley*, 10 W. Va. 96.

15. *Fouche v. Brower*, 74 Ga. 251; *Gable v. Columbus Cigar Co.*, 140 Ind. 563, 566, 38 N. E. 474.

16. 1 Story Eq. Jur., § 350.

17. *Abbey v. Deyo*, 44 N. Y. 343.

18. "The cruelty of the Twelve Tables of the Roman laws against insolvent debtors still remains to be told; and I shall dare to prefer the literal sense of antiquity to the specious refinements of modern criticism. After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow-citizen. In this private prison, twelve ounces of rice were his

debtor might be allowed to die in prison if his friends failed to provide for his necessities.¹⁹ The savagery of the early Latins, though much softened, still survives in the continental insolvent and bankruptcy systems of to-day. In France, not only must a bankrupt in effect pay his debts in full, but imprisonment for debt, except in cases of misfortune, and the penalty of penal servitude for a number of years for fraudulent bankruptcy still exists, and these restraints on the liberty of the dishonest trader are characteristic of all European laws. They are a survival of the time when inability to pay a debt was a crime. England stands midway between these systems and our own. Fraudulent bankruptcy is a crime,²⁰ but, except as against certain well defined statutory objections, a discharge may generally be obtained whatever the rate per cent.²¹

daily food; he might be bound with a chain of fifteen pounds weight; and his misery was thrice exposed in the market-place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tiber; but if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from contracting debts which they were unable to discharge; but experience would dissipate this salutary terror, by proving, that no creditor could be found to exact this unprofitable penalty of life or limb. As the manners of Rome were insensibly polished, the criminal code of the decemvirs was abolished by the humanity of ac-

cusers, witnesses, and judges; and impunity became the consequence of immoderate rigor. The Porcian and Valerian laws prohibited the magistrates from inflicting on a free citizen any capital, or even corporal punishment; and the obsolete statutes of blood were artfully, and perhaps truly, ascribed to the spirit, not of patrician, but of regal tyranny." Milman's *Gibbon's Rome*, vol. III, pp. 183-184.

19. *Manby v. Scott*, 1 Mod. 132, Hyde J., "If a man be taken in execution, and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law; and so say I."

20. Debtors Act of 1869, part II.

21. Act of 1890, § 8; *Collier Bankr.* (5th ed.) 168.

CHAPTER II.

NATURE AND FORM OF TRANSFER.

- Section 1. Nature and form of transfer generally.
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 5. Purchase of property through or in name of third person.
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 19. Cancellation or release of debt or claim.
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 22. Keeping mortgage in force after payment.
 23. Keeping judgment open after payment.
 24. Keeping certificate of execution sale in force.
 25. Antedated note.
 26. Fraud directed against debtor.

Section 1. Nature and form of transfer generally.—A conveyance by a debtor of his property, whether directly or indirectly made, and whatever its form, is void as against the grantor's creditors, if made with the intent and purpose to defraud them. The nature and form of the transfer are of small importance. Where fraud appears courts will ignore all matters of form and expose and punish the corrupt act.¹ It is a principle as old as the law of

¹ *Ind.*—Buck v. Voreis, 89 Ind. 116.

La.—Haas v. Haas, 35 La. Ann. 885, a conveyance of property, though

by attachment or other judicial proceeding, will be revoked, if there is fraud or collusion.

Md.—Schaferman v. O'Brien, 28

morals, and which has been engrafted into the law of equity and justice, that good faith is the basis of all dealing, and that every description of contract, and every transfer or conveyance of property, by what means soever it be done, is vitiated by fraud. Deeds, obligations, contracts, judgments, corporate bodies, and all devices and instruments resorted to to cover up fraud, are, whenever the law is invoked, declared nullities and are looked upon as if they had never been executed.² It does not alter the character of a fraudulent arrangement, or enable it to defy justice, that it was accomplished through the agency of a valid judgment regularly enforced. That often may be made an effective agency in accomplishing beyond its own legitimate purpose a further result of fraud and dishonesty, and may even be selected as the suitable means by reason of its inherent character.³ The use of sheriff's deeds and other legal instruments to effect a fraudulent conveyance of property by a debtor is no bar to its avoidance by creditors.⁴ In some instances the term "conveyance," as used in statutes against fraudulent conveyances, is expressly defined as including "every instrument in writing, except a last will and testament, whatsoever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered."⁵

Md. 565, 92 Am. Dec. 708, however solemn the instrument in its formalities, if it had its origin in fraud it is a nullity, so far as the creditors of the grantor are concerned.

Miss.—White v. Trotter, 14 Sm. & M. 30, 50 Am. Dec. 112.

2. Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372. See also Skowhegan Bank v. Cutler, 49 Me. 315; Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522, that a transfer of personal property was evidenced by an elaborate instrument in writing is a circumstance of slight importance.

3. Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Hardt v. Schwab, 72 Hun (N. Y.), 109, 25 N. Y. Supp. 402, a creditor having a just claim against a failing debtor must not use it for the purpose of placing the property of the debtor beyond the reach of other creditors, and for the benefit of the failing debtor.

4. Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Lee v. Cole, 44 N. J. Eq. 323, 15 Atl. 531; Metropolitan Bank v. Durant, 22 N. J. Eq. 35. See also Execution and other judicial sales, chap. II, § 14, *infra*.

5. Mill Annot. St. Colo. 1891, § 2036; Mich. Comp. Laws, 1897, §

§ 2. Particular forms of fraudulent conveyances.—The forms in which conveyances or transfers of a debtor's property may be made in fraud of his creditors are many and various and embrace absolute conveyances or transfers of real property,⁶ and of personal property,⁷ whether made with or without an adequate

9538; Minn. St. 1894, § 4226; Wis. St., 1898, § 2326.

6. *Ind.*—Thorp v. Jarrell, 66 Ind. 52, a voluntary deed placed on record by the grantor, but never delivered to the grantee, nor accepted by him.

La.—Emswiller v. Burham, 6 La. Ann. 710, a transfer by a totally insolvent debtor of all his real and personal property is out of the usual course of business, and is indicative of fraud.

Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am. Dec. 303, a deed otherwise void cannot be sustained on account of a secret oral contract that the property should be held in trust by the grantee and sold for the benefit of grantor's creditors; Duvall v. Waters, 1 Bland, 569, 18 Am. Dec. 350, a loose and irregular description of the property is indicative of fraud.

Miss.—Roach v. Deering, 9 Sm. & M. 316, where a sale under a mortgage with power of sale was held merely colorable.

N. J.—McKeague v. Armstrong, 50 N. J. Eq. 309, 24 Atl. 398, conveyance by father to son in consideration of the assumption of the father's debts.

Ohio.—Piatt v. St. Clair, 6 Ohio, 227, Wright, 261, sale by an administrator to a trustee for the benefit of his heirs.

Or.—Morrell v. Miller, 28 Or. 354, 43 Pac. 490, deed by debtor to his attorney held to be valid only as security to the amount of the attorney's fees.

Pa.—American Academy of Music v. Smith, 54 Pa. St. 130, a conveyance to avoid payment of ground rent; Hays v. Heidelberg, 9 Pa. St. 203, sale on execution to administrator of judgment debtor to hold in trust for creditor while the value of the property increases.

Conveyance held to be valid.—Blish v. Collins, 68 Mich. 542, 36 N.W. 731, deeds executed in good faith for a valuable consideration and recorded prior to an attachment; Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509, conveyance to grantee in good faith in trust for the equitable owners of the property.

7. *N. Y.*—Downing v. Kelly, 49 Barb. 547, a failing debtor has no right to interpose a legal title between his property and his debts, to compel his creditors to take notes drawn on time in payment of their debts.

U. S.—Kempner v. Churchill, 75 U. S. 362, 19 L. Ed. 461, property sold much below cost within a month after it was bought and before it was paid for hastily removed; Smith v. New York L. Ins. Co., 57 Fed. 133, where \$5,000 in money was included in the bill of sale; Judson v. Courier Co., 15 Fed. 541, transfer made outside of the usual course of business; Nisbet v. Quinn, 7 Fed. 760, sales of nearly two-thirds of his stock made to three persons by a retail merchant within a few days.

Ala.—Rodenberg v. H. B. Claffin Co., 104 Ala. 560, 16 So. 448; H. B.

and valuable consideration,⁸ and whether or not the instrument of conveyance be duly acknowledged and recorded.⁹ The conveyance

Claffin Co. v. Rodenberg, 101 Ala. 213, 13 So. 272, where more goods were delivered to the purchaser than were mentioned in the bill of sale the entire sale is vitiated.

Ill.—*Grieb v. Caraker*, 69 Ill. App. 236; *Thorne v. Crawford*, 17 Ill. App. 395, transfer by debtor to certain creditors of all his available assets valued at three times the amount of their claims.

Me.—*Richardson v. Kimball*, 28 N. E. 463, vessel transferred without bill of sale or other written evidence.

Md.—*Duvall v. Waters*, 1 Bland. 569, 18 Am. Dec. 350. A bill of sale is invalid by statute unless indorsed with an affidavit as to consideration and *bona fides* thereof. *Denton v. Griffith*, 17 Md. 301.

Mass.—*Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075, transfers not according to the usual course of business; *Killam v. Pierce*, 153 Mass. 502, 27 N. E. 520, sale of stock of goods, taking notes in payment which were not yet due.

Mo.—*Crane v. Timberlake*, 81 Mo. 431, sale by an execution debtor to an antecedent creditor of certain sheep which were never separated from other sheep.

Neb.—*Switz v. Bruce*, 16 Neb. 463, 20 N. W. 639, preference to creditor.

Pa.—*Forsyth v. Matthews*, 14 Pa. St. 100, 53 Am. Dec. 522.

Vt.—*Read v. Moody*, 60 Vt. 668, 15 Atl. 345, transaction not in the usual course of business.

Va.—*Briscoe v. Clark*, 1 Rand. 213, conveyance of grantor's entire property, reserving life estate to himself and wife.

Payment or satisfaction of lia-

bilities.—Where plaintiff sold his merchandise, fixtures and business to K, who, being unable to pay the balance of the price, retransferred the property to plaintiff, in bulk, in consideration of the satisfaction of the debt, without making an inventory or furnishing a list of his creditors and notifying them, as required by a statute regulating sales in bulk, such retransfer, though an accord and satisfaction of K's debt to plaintiff, was also, in respect to the merchandise, a "sale" within such act, and was therefore fraudulent as against K's creditors. *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772.

Conveyances held to be valid.

—*U. S.*—*Jones v. Sleeper*, 13 Fed. Cas. No. 7,496, a transfer of goods by a general description, where possession is delivered.

Ala.—*Andrews v. Jones*, 10 Ala. 400, sale on credit is not fraudulent if the vendee has taken a mortgage or other form of security on the property transferred.

Ill.—*Ewing v. Runkle*, 20 Ill. 448, transfer by insolvent to one creditor with the consent of other creditors.

Ind.—*Kane v. Drake*, 27 Ind. 29, taking attested bill of sale not a badge of fraud.

Iowa.—*Johnson v. McGrew*, 11 Iowa, 151, 77 Am. Dec. 137, sale by debtor to one creditor for a fixed consideration, paid in part by discharging his claim, in part by paying other debts of grantor, and balance in money.

La.—*Hirsch v. Fudicker*, 43 La. Ann. 886, 9 So. 742, sale to one not a creditor for an adequate consideration in cash.

or transfer may be in the form of a voluntary conveyance or transfer, the effect of want of consideration for which is discussed under that head;¹⁰ an assignment or transfer of a promissory note,¹¹ life-insurance policy,¹² the right of a patentee in a patented invention,¹³ or other chose in action;¹⁴ a deed of trust, mortgage of real or personal property, or a pledge of personal property or choses in action;¹⁵ a bond and mortgage to cover up property;¹⁶ a fraudulent foreclosure of a real estate or chattel mortgage or a deed of trust;¹⁷ or a fraudulent attachment.¹⁸ A fraudulent judgment, by confession or in legal proceedings, and a sale on execution thereon;¹⁹ a fraudulent organization of a corporation and transfer of property to it;²⁰ an ante-nuptial or post-nuptial settlement by a husband on his wife, directly or through a third person, or to trustees for her benefit;²¹ the release by a husband to his right to his wife's earnings;²² the emancipation of his child by a debtor;²³ or the attempted creation of a joint tenancy to prevent the collec-

Minn.—Derby v. Gallup, 5 Minn. 119.

Mo.—State v. Merritt, 70 Mo. 275, the question whether the sale was made in the usual and ordinary course of business is for the jury.

Pa.—Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522.

8. Grieb v. Caraker, 69 Ill. App. 236. And see Effect of consideration, chap. XIII, § 30, *infra*.

9. Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708.

10. See Effect of want of consideration, chap. VIII, §§ 32-36, *infra*.

11. Killam v. Peirce, 153 Mass. 502, 27 N. E. 520.

12. See Life insurance, chap. IV, § 20, *infra*.

13. Gilbert v. Bate, 86 N. Y. 87. See also Patents, copyrights and trade marks, chap. IV, § 18, *infra*.

14. Harding v. Elliott, 91 Hun (N. Y.), 502, 36 N. Y. Supp. 648, assignment of a deposit in bank by a

solvent non-resident to prevent attachment. See also Choses in action, chap. IV, § 7, *infra*.

15. See next section.

16. Jordan v. Fenno, 13 Ark. 593.

17. See Foreclosure of Mortgages and deeds of trust, chap. II, § 13, *infra*.

18. See Attachment, chap. II, § 15, *infra*.

19. See Collusive and fraudulent legal proceedings, chap. II, § 9, *infra*.

20. See Organization of corporation, chap. II, § 16, *infra*.

21. Fisher v. Schlosser, 41 Ohio St. 147; Kanawha Valley Bank v. Wilson, 25 W. Va. 242; Bulmer v. Hunter, 38 L. J. Ch. 543, L. R. 8 Eq. 46, 20 L. T. Rep. N. S. 942. See also Marriage as consideration, chap. VIII, § 25, *infra*.

22. See Wages of debtor's wife, chap. IV, § 9, *infra*.

23. See Wages of debtor's minor child, chap. IV, § 10, *infra*.

tion of a judgment,²⁴ are other forms in which a debtor may make a conveyance or transfer of his property in fraud of his creditors. Where a debtor is induced by the fraud of a buyer to sell his business to the buyer, the buyer becomes a constructive trustee of the property bought for the debtor, which constitutes an equitable asset of the debtor subject to be reached by a judgment creditor in a suit in equity.²⁵

§ 3. **Transfers as security.**—A mortgage or deed of trust of real property made by a debtor to secure the payment of debts, or advances made or to be made, is fraudulent and void as against creditors of the mortgagor, if made with intent to hinder, delay, or defraud them.²⁶ But it will not be held fraudulent when

24. *Foster v. Whelpley*, 123 Mich. 350, 82 N. W. 123.

25. *Pritz v. Jones*, 117 App. Div. (N. Y.) 643, 102 N. Y. Supp. 549.

Transactions not subject to attack.—A defendant furnished money to a third person with which to buy the stock of goods and business of a seller. Defendant never had in his possession any of the property sold. The seller was incompetent and paid from the proceeds of the sale a debt due to defendant. *Held*, that a judgment creditor of the seller was not entitled to set aside the transaction as fraudulent. *Pritz v. Jones, supra*.

A debtor held a lease of a saloon for a year, with the right to renew from year to year so long as he bought beer from the landlord. The landlord required the debtor to assume a mortgage on the premises. The mortgage was not a lien on anything ever owned by the debtor or transferred by him. The saloon building and fixtures were owned by the landlord. There was nothing to show that the landlord was attempting to enforce any claim secured by

the mortgage. *Held*, that a judgment creditor of the debtor was not entitled to a cancellation of the mortgage as fraudulent. *Pritz v. Jones, supra*.

26. *U. S.*—*Valentine v. Hurd*, 21 Fed. 749; *Stephens v. Sherman*, 22 Fed. Cas. No. 13,369a, *affd.* *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 80.

Ala.—*McDowell v. Steele*, 87 Ala. 493, 6 So. 288; *Hall v. Heydon*, 41 Ala. 242; *Wiswall v. Ticknor*, 6 Ala. 178.

Conn.—*DeWolf v. A. & W. Sprague Mfg. Co.*, 49 Conn. 282; *North v. Belden*, 13 Conn. 376, 35 Am. Dec. 83, to render a mortgage valid as against the creditors of the mortgagor, the real nature of the transaction, so far as it can be disclosed, must appear from the record with reasonable certainty, or at least the record must point out a track by pursuing which the inquirer may ascertain it.

Ky.—*Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 280, and a decree of foreclosure and sale under it are void as to creditors.

made in good faith and not with the intent to hinder, delay, or defraud creditors.²⁷ If there is actual fraud the transfer is void notwithstanding it was given to secure *bona fide* indebtedness.²⁸ A transfer of choses in action or other personal property as collateral to secure indebtedness, either by way of pledge, or by way of chattel mortgage, deed of trust, or contract for a lien, if made without consideration, or with intent to hinder, delay, or defraud creditors, or if it contains provisions which have such effect, is fraudulent and void as to creditors of the pledgor or mortgagor.²⁹ But if the transfer be *bona fide* and does not contain provisions in hindrance, delay, or fraud of creditors, it leaves the equitable and beneficial ownership in the debtor while so

Me.—Aiken v. Kilburne, 27 Me. 252.

Mo.—Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107, when facts which invalidate it appear expressly or by implication on its face.

Tenn.—Bennett v. Union Bank, 5 Humphr. 612.

W. Va.—Hope v. Valley City Salt Co., 25 W. Va. 789.

27. Rio Grande R. Co. v. Vinet, 132 U. S. 565, 10 Sup. Ct. 168, 33 L. Ed. 438, mortgage of his individual property by a partner, to his firm, to enable it to continue business, is not in fraud of partnership creditors; United States v. Griswold, 8 Fed. 496; Vincent v. Suoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

28. Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; McDonald v. Hoover, 142 Mo. 484, 44 S. W. 334.

29. N. Y.—Dearing v. McKinnon Dash, etc., Co., 33 App. Div. 31, 53 N. Y. Supp. 513, a chattel mortgage given to secure creditors, which vested the trustee with discretionary power as to the time and manner of converting the property into cash,

and gave him liberty to sell on credit, and defer payment of creditors indefinitely.

U. S.—Tuck v. Olds, 29 Fed. 738; In re Bloom, 3 Fed. Cas. No. 1,557, Chattel mortgage on present and after-acquired stock of goods.

Ala.—Wiswall v. Ticknor, 6 Ala. 178.

Ga.—Hoffer v. Gladden, 75 Ga. 532.

Ill.—Grieb v. Caraker, 69 Ill. App. 236.

Me.—Wheelden v. Wilson, 44 Me. 11.

Mich.—Pettibone v. Byrne, 97 Mich. 85, 56 N. W. 236.

Miss.—Tobin v. Allen, 53 Miss. 563.

Mo.—Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107.

Tenn.—McCrasly v. Hasslock, 63 Tenn. 1.

Tex.—Gregg v. Cleveland, 82 Tex. 187, 17 S. W. 777.

Wis.—Baum v. Bosworth, 68 Wis. 196, 31 N. W. 744.

A verbal agreement between a debtor and creditor, by which the former gives a lien upon certain property to the latter, is valid be-

held in pledge or as security, and is not fraudulent as to creditors of the pledgor or mortgagor.³⁰ An absolute conveyance of lands intended as a security for a debt is held by the courts in some jurisdictions to be fraudulent and void as against existing creditors, although there may be no actual fraudulent intent,³¹ while in other jurisdictions a contrary rule is held in the absence of actual fraud.³² The act of a mortgagee in a chattel mortgage releasing a portion of the chattel mortgage, taking other property as security in lieu thereof, does not render the mortgage void at the instance of creditors of the mortgagor.³³

§ 4. **Conditional sales.**—A conditional as well as an absolute sale may be fraudulent as against creditors.³⁴ A conditional sale, that is, a sale under an agreement that the title to the property shall remain in the seller until the purchase price is paid, although possession is delivered to the purchaser, was valid at common law and its validity was not affected by the English statute of frauds.³⁵ By the weight of authority conditional sales of personal property are valid between the parties and as against creditors of and subsequent purchasers from the grantee, in the absence of fraud.³⁶

tween the parties, but void as to creditors and subsequent purchasers in good faith. *Osterbag v. Galbraith*, 23 Neb. 730, 37 N. W. 637.

30. *Ala.*—*Walthall's Ex'rs v. Rives*, 34 Ala. 91.

Ark.—*Goodbar v. Locke*, 56 Ark. 314, 19 S. W. 924.

Mass.—*Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075.

Tex.—*Simon v. McDonald*, 85 Tex. 237, 20 S. W. 52.

Wash.—*Vincent v. Suoqualmie Mill Co.*, 7 Wash. 566, 35 Pac. 396.

A bill of sale of personal property, containing a clause of defeasance for a valuable consideration, and *bona fide*, is not fraudulent as to creditors, under the statutes of Alabama. *Kil-*

lough v. Steele, 1 Stew. & P. (Ala.) 262.

31. *Sims v. Gaines*, 64 Ala. 392.

32. See *Badges of fraud*—Absolute conveyance as security, chap. VI, § 15, *infra*; Secret reservations and trusts—Absolute conveyance intended as security, chap. X, § 16, *infra*.

33. *Wellington v. Terry* (Colo., 1907), 88 Pac. 467.

34. *Gifford v. Ford*, 5 Vt. 532.

35. *Thompson v. Walker*, 5 Fed. 419, 2 McCrary, 33, the Arkansas statute of frauds has no operation on such sales until the possession has continued in the vendee for five years.

36. *U. S.*—*In re Binford*, Fed.

A stipulation in a sale of goods that, though the goods be delivered, the title shall not pass until the price is paid, is valid; and if there is no fraud, and nothing more than mere possession of the goods by the buyer to indicate authority in him to sell them, a sale made by him before he has paid the price to his vendor will not impair the latter's title.³⁷ In some jurisdictions, however, an agreement between a vendor and vendee of personal property delivered to the latter, that the property shall be considered as belonging to the former until paid for, is fraudulent and void as to creditors of the vendee,³⁸ and it is immaterial whether the creditor trusted the debtor on the credit of the goods which were in his possession or not.³⁹ An agreement by which a chattel is delivered to another for hire, without a definite term and with an option to purchase, is a bailment, and not a conditional sale, and hence is not fraudulent as to creditors of the bailee.⁴⁰ The sale of a stock of goods cannot be conditional, as between the vendor and the creditors of the vendee, where such goods were placed in the possession of the vendee for the express purpose of selling at retail, pending arrangements for his paying for them, but such goods must be deemed the property of such vendee.⁴¹ In some jurisdictions conditional sales are required by statute to be recorded to be valid as against creditors of or purchasers from the vendee in actual possession, without notice.⁴²

Cas. No. 1,411, 3 Hughes, 295, *rev'd*
Fed. Cas. No. 1,411a, 3 Hughes,
304.

Ala.—South Alabama Oil, etc., Co.
v. Garner, 112 Ala. 447, 20 So. 628.

Conn.—Tomlinson v. Roberts, 25
Conn. 477, 68 Am. Dec. 367; Forbes
v. Marsh, 15 Conn. 384.

Fla.—Campbell Printing Press,
etc., Co. v. Walker, 22 Fla. 412, 1 So.
59.

Mass.—Blanchard v. Cooke, 144
Mass. 207, 11 N. E. 83; Ayer v. Bart-
lett, 23 Mass. 71; Patten v. Clark,
22 Mass. 5, 16 Am. Dec. 365.

N. H.—Esty v. Aldrich, 46 N. H.
127.

37. *In re Binford, supra.*

38. McCormick v. Hadden, 37 Ill.
370; Frank v. Price, 1 Leg. Rec. Rep.
(Pa.) 101; Heppe v. Speakman, 3
Brewst. (Pa.) 548, 7 Phila. 117.

39. Martin v. Mathiot, 14 Serg. &
R. (Pa.) 214, 16 Am. Dec. 491.

40. Sporer v. Dale, 5 Pa. Co. Ct.
611.

41. Devlin v. O'Neill, 6 Daly (N.
Y.), 305.

42. Moline Plow Co. v. Braden, 71
Iowa, 141, 32 N. W. 247.

The rule that, if possession remains with the grantor in an absolute bill of sale, it is fraudulent as to creditors and *bona fide* purchasers, does not apply to conditional sales.⁴³ But if the vendor of personal property, after a conditional sale, remain in possession, it is evidence of fraud as against the creditors of the vendor and *bona fide* purchasers,⁴⁴ and, unless sufficient reason is shown for it, the evidence will be conclusive.⁴⁵ Under a conditional sale, followed by the delivery of the goods, not expressly qualified, the vendee takes the title to them, which, though it may be defeasible between the original parties, like title fraudulently obtained, will be protected as to subsequent purchasers from such vendee.⁴⁶

§ 5. Purchase of property through or in name of third person.—It has been held in some cases that the statute of 13 Elizabeth and similar statutes in the United States only apply to conveyances made by the fraudulent debtor himself, and that consequently purchases by the debtor or with his means, when the title is taken in the name of a third person, are not necessarily fraudulent and void as to the creditors of the debtor, and cannot be avoided by them as fraudulent.⁴⁷ But the courts, as a general rule, have held that where lands were conveyed to one, which

43. *U. S.*—*Conard v. Atlantic Ins. Co.*, 26 U. S. 386, 7 L. Ed. 189.

Colo.—*Roberts v. Hawn*, 20 Colo. 77, 36 Pac. 886.

Ga.—*Scott v. Winship*, 20 Ga. 429.

Ky.—*Bucklin v. Thompson*, 24 Ky. 223.

Md.—*Hudson v. Warner*, 2 Harr. & G. 415.

Mass.—*Badlam v. Tucker*, 18 Mass. 389, 11 Am. Dec. 202.

But see *King v. Bailey*, 6 Mo. 575, possession of personal property by a vendee, after a conditional sale, is fraudulent and void as to creditors, prior or subsequent.

44. *Swift v. Thompson*, 9 Conn. 63, 21 Am. Dec. 718; *Hombeck v.*

Vanmetre, 9 Ohio, 153. See *Johnson v. Hays*, 5 Ohio St. 101.

45. *Swift v. Thompson*, *supra*.

46. *Mears v. Waples*, 4 Houst. (Del.) 62. *Contra*—*Sawyer v. Shaw*, 9 Me. 47; *Corse v. Patterson*, 6 Har. & J. (Md.) 153.

47. *N. Y.*—*Cramer v. Blood*, 57 Barb. 155.

Ky.—*Marshall v. Marshall*, 2 Bush, 415; *Crozier v. Young*, 3 T. B. Mon. 157, bank stock subscribed and paid for by a father for and in the names of his children, without valuable consideration, and while he was insolvent; *Doyle v. Sleeper*, 1 Dana, 531.

Miss.—*Edmonson v. Meacham*, 50

were purchased with the money of another, the grantee was to be deemed a mere trustee for the actual purchaser and that the latter was entitled to a resulting trust, which could be asserted, in equity, either by him or by his judgment creditors, in virtue of his clear and absolute right, and that, therefore, independently of statute, such a conveyance was fraudulent as to creditors.⁴⁸ In

Miss. 34; *Carlisle v. Tindall*, 49 Miss. 229.

N. C.—*Gowing v. Rich*, 23 N. C. 553, because if the creditor treated such conveyance as void, under the statute, the effect would be to place the legal title back in the third person, where it would be beyond the creditor's reach.

Ohio.—*Shorten v. Woodrow*, 34 Ohio St. 645; *Mason v. Echels*, 8 Wkly. L. Bul. 7.

S. C.—*Taylor v. Heriot*, 4 Desauss. Eq. 227.

Eng.—*Lamplugh v. Lamplugh*, 1 P. Wms. 111, 24 Eng. Reprint, 316.

48. *N. Y.*—*McCartney v. Bostwick*, 32 N. Y. 53, *rev'd* 31 Barb. 390; *Kline v. McDonnell*, 62 Hun, 177, 16 N. Y. Supp. 649.

Ala.—*Kelley v. Connell*, 110 Ala. 543, 18 So. 9; *Stoutz v. Huger*, 107 Ala. 248, 18 So. 126; *Peavey v. Cabaniss*, 70 Ala. 253; *Doe v. McKinney*, 5 Ala. 719.

Ark.—*Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707, but it will not be considered as void, the grantee being treated as a trustee for the benefit of the debtor's creditors; *Bennett v. Hutson*, 33 Ark. 762; *Miller v. Fraley*, 21 Ark. 22.

Colo.—*Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850.

Conn.—*Botsford v. Beers*, 11 Conn. 369; *Whittlesey v. McMahon*, 10 Conn. 137, 26 Am. Dec. 389.

Del.—*Newell v. Morgan*, 2 Harr. 225.

D. C.—*Thyson v. Foley*, 1 App. Cas. 182.

Fla.—*Reel v. Livingston*, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; *Alston v. Rowles*, 13 Fla. 117.

Ga.—*Field v. Jones*, 10 Ga. 229; *Pitts v. Bullard*, 3 Ga. 5, 46 Am. Dec. 405.

Ill.—*Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486.

Ind.—*Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610; *Ewing v. Gray*, 12 Ind. 64; *Demaree v. Driskill*, 3 Blackf. 115; *Kipper v. Glancey*, 2 Blackf. 356.

Iowa. *Boulton v. Hahn*, 58 Iowa, 518, 12 N. W. 560; *Gear v. Schrei*, 57 Iowa, 666, 11 N. W. 625.

Ky.—*Matthews v. Albritton*, 83 Ky. 32; *Adams v. O'Rear*, 80 Ky. 129; *Rucker v. Abell*, 8 B. Mon. 566, 48 Am. Dec. 406; *Turner-Looker Co. v. Garvey*, 19 Ky. L. Rep. 1205, 43 S. W. 202; *Davis v. Justice*, 14 Ky. L. Rep. 741, 21 S. W. 529.

Me.—*Trefethen v. Lynam*, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; *Augusta Sav. Bank v. Crossman* (1886), 7 Atl. 396; *Gray v. Chase*, 57 Me. 558; *Dockray v. Mason*, 48 Me. 178; *Golding v. Brackett*, 34 Me. 27.

Md.—*Second Nat. Bank v. Yeatman*, 53 Md. 443; *Trego v. Skinner*, 42 Md. 426.

Mass.—*Bresnihan v. Sheehan*, 125 Mass. 11.

Minn.—*Blake v. Boisjoli*, 51 Minn.

some cases it has been held that the conveyance may be avoided by a purchaser, at a sheriff's sale of the debtor's title.⁴⁹ In some states the statutes against fraudulent conveyances and transfers, while abolishing resulting trusts, preserve such trusts when resulting to a debtor for the benefit of creditors, or declare a new and independent resulting trust, in favor of the general creditors of the party paying the consideration, in every case where the conveyance is fraudulently made to another with his assent.⁵⁰

296, 53 N. W. 637; *Sumner v. Sawtelle*, 8 Minn. 309.

Miss.—*Simmons v. Ingram*, 60 Miss. 886; *Edmonson v. Meacham*, 50 Miss. 34.

Mo.—*Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Cutzwiller v. Lackman*, 23 Mo. 168.

Neb.—*Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152.

N. J.—*Conover v. Ruckman*, 36 N. J. Eq. 493; *Haggerty v. Nixon*, 26 N. J. Eq. 42; *Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 13.

N. C.—*Gentry v. Harper*, 55 N. C. 177; *Dobson v. Erwin*, 18 N. C. 569.

Ohio.—*Vanzant v. Davies*, 6 Ohio St. 52; *Miller v. Wilson*, 15 Ohio, 108; *Edgington v. Williams, Wright*, 439.

S. C.—*Godbold v. Lambert*, 8 Rich. Eq. 155, 70 Am. Dec. 192; *Brown v. McDonald*, 1 Hill Eq. 297; *Taylor v. Heriot*, 4 Desauss. Eq. 227.

S. D.—*Smith v. Tosini*, 1 S. D. 632, 48 N. W. 299.

Tenn.—*Goff v. Dabbs*, 4 Baxt. 300; *Gaugh v. Henderson*, 2 Head, 628; *Walters v. Brown* (Ch. App.), 46 S. W. 777.

Vt.—*Corey v. Morrill* 71 Vt. 51, 42 Atl. 976; *Dewey v. Long*, 25 Vt.

564; *Waterman v. Cochran*, 12 Vt. 699.

Va.—*Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757.

Wash.—*Curry v. Catlin*, 9 Wasn. 495, 37 Pac. 678, 39 Pac. 101.

W. Va.—*Martin v. Warner*, 34 W. Va. 182, 12 S. E. 477; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *McMasters v. Edgar*, 22 W. Va. 673; *Rose v. Brown*, 11 W. Va. 122; *Lockhard v. Beckley*, 10 W. Va. 87.

Can.—*O'Doherty v. Ontario Bank*, 32 U. C. C. P. 285.

Eng.—*Stone v. Van Heythuysen*, 18 Jur. 344, 11 Hare, 126, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

See also Property purchased in name of third person, chap. IV, § 29, *infra*; Consideration paid by husband for property conveyed to wife, chap. VIII, § 44, *infra*; Conveyances to wife from third persons, chap. IX, § 6, *infra*; Procuring conveyance from third person, chap. IX, § 9, *infra*; Conveyance in name of third person, chap. XIV, § 34, *infra*.

49. *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Kimmel v. McRight*, 2 Pa. St. 38; *Clark v. Chamberlain*, 13 Allen (Mass.), 257, the land is liable to execution on a judgment against the person paying the consideration, by statute.

50. *N. Y.*—*Dunlap v. Hawkins*, 59

§ 6. **Purchase of property by husband in name of wife.**—The rule stated in the last section as to the purchase of property in the name of a third person applies to a purchase of lands by a husband with his own funds, taking the title in the name of his wife, or in the name of a third person for her benefit, and such a conveyance is fraudulent and void as against his existing creditors.⁵¹ Property purchased by a husband in the name of his wife, but paid for with his money, is subject to levy and sale under execution against him.⁵² The same rule applies where the husband purchases property with money or property which was his wife's but which became his by virtue of his marital rights by reduction to his possession, and such conveyances are declared to be fraudulent and void as against the husband's creditors.⁵³

N. Y. 342; *McCartney v. Bostwick*, 32 N. Y. 53; *Kline v. McDonnell*, 62 Hun, 177, 16 N. Y. Supp. 649; *Tappan v. Butler*, 7 Bosw. 480; 3 *Birdseye Rev. St.*, p. 3025, § 74.

Ind.—*Thornton St.*, §§ 3461, 3462 (1897).

Ky.—*Adams' Ex'r v. O'Lear*, 80 Ky. 129, 3 Ky. L. Rep. 605; *Gen. St.*, chap. 63, art. 1, § 20.

Mich.—*Fairbairn v. Middlemiss*, 47 Mich. 372, 11 N. W. 203; *Comp. Laws* (1897), §§ 8835, 8836.

Minn.—*Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637; *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104.

Ohio.—*Bloomington v. Stein*, 42 Ohio St. 168; *Ohio Rev. St.*, § 6344, avoiding all "transfers, conveyances or assignments" made with intent to defraud creditors.

51. Ala.—*Peevey v. Cabaniss*, 70 Ala. 253.

Ark.—*Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707.

Ky.—*McBride v. McLaughlin*, 5

Ky. L. Rep. 174; *Yates v. Fisher*, 4 Ky. L. Rep. 721.

Me.—*Call v. Perkins*, 65 Me. 439.

Miss.—*Bernheim v. Beer*, 56 Miss. 149.

Ohio.—*Parish v. Rhodes, Wright*, 339.

Va.—*Quarles v. Lacy*, 4 Munf. 251.

Wis.—*Hoxie v. Price*, 31 Wis. 82.

See also cases cited in notes to last preceding section.

Compare Cannon v. Castlemon, 164 Ind. 343, 73 N. E. 689.

52. N. Y.—*Stokes v. Amerman*, 55 Hun, 605, 7 N. Y. Supp. 733.

D. C.—*Thyson v. Foley*, 1 App. D. C. 182.

Fla.—*Alston v. Rowles*, 13 Fla. 117.

Ind.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

Iowa.—*Gear v. Schrei*, 57 Iowa, 666, 11 N. W. 625.

Me.—*Berry v. Berry*, 84 Me. 541, 24 Atl. 957; *Call v. Perkins*, 65 Me. 439.

Mo.—*Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559.

53. Davis v. Justice, 14 Ky. L. Rep.

But the husband's creditors cannot reach and subject to the payment of their claims property which was purchased by the husband in his wife's name and paid for with the wife's separate estate.⁵⁴ Nor can the property be reached by his creditors where the husband gives his note in payment for land so purchased, and the note is paid by the wife from her separate estate.⁵⁵ Where conveyances are made to the wife of a debtor, however, the consideration will be presumed to have been paid by the husband, and in contests with creditors of her husband the burden of proof is upon the wife to show affirmatively that it was paid for with funds not furnished by her husband but from her separate estate.⁵⁶

741, 21 S. W. 529. See also Husband's curtesy or other interest in wife's property, chap. IV, § 37, *infra*.

54. N. Y.—Popfinger v. Yutte, 102 N. Y. 38, 6 N. E. 259.

U. S.—Frankenthal v. Gilbert, 34 Fed. 5.

Ga.—Rutherford v. Chapman, 59 Ga. 177.

Ind.—Jones v. Snyder, 117 Ind. 229, 20 N. E. 140; Tracy v. Kelley, 52 Ind. 535; Malady v. McEnary, 30 Ind. 273.

Iowa.—Gilbert v. Glenn, 75 Iowa, 513, 39 N. W. 818, 1 L. R. A. 479; Stoddard v. Rowe, 74 Iowa, 670, 39 N. W. 84.

Ky.—Howard v. Tenney, 87 Ky. 52, 7 S. W. 547, 10 Ky. L. Rep. 94; Truitt v. Curd, 13 Ky. L. Rep. 118, 16 S. W. 364.

Mich.—Buhl v. Peck, 70 Mich. 44, 37 N. W. 876.

Mo.—Bartlett v. Umfried, 94 Mo. 530, 7 S. W. 581.

Neb.—Morse v. Raben, 27 Neb. 145, 42 N. W. 901; Wood v. O'Hanlon, 26 Neb. 527, 42 N. W. 733; Shortel v. Young, 23 Neb. 408, 36 N. W. 572.

Pa.—Bollinger v. Gallagher, 170 Pa.

St. 84, 32 Atl. 569, if the sureties on and payee in a note signed by the husband and wife for property bought trusted to the responsibility of the wife alone, the wife could hold the property against her husband's creditors.

Tenn.—Cook v. Jones, (Ch. App. 1897), 47 S. W. 14, where property was purchased with money of the wife and in her behalf and by her direction title was taken by the husband as trustee for the support of himself and children.

Va.—Scott v. Rowland, 82 Va. 484, 4 S. E. 595. See also Separate property or estate of debtor's wife; Husband's curtesy or other interest in wife's property, chap. IV, §§ 36, 37, *infra*; Transactions between husband and wife, chap. VIII, § 38, *infra*; Conveyance to wife from third person, chap. IX, § 6, *infra*.

55. Rutherford v. Chapman, 59 Ga. 177.

56. Ill.—Bowman v. Ash, 143 Ill. 649, 32 N. E. 486.

Ky.—Treadway v. Turner, 10 Ky. L. Rep. 949, 10 S. W. 816.

§ 7. **Purchase of personal property by husband in name of wife.**—Where a bill of sale of personal property is taken in the name of the wife or another third person, but the purchase money is paid by the husband, in the absence of proof that the money belonged to the wife or other third person, neither the title of the wife or other third person nor that of any one claiming under them will defeat the lien of an execution against the husband.⁵⁷

§ 8. **Payment of liens; loans; improvements on lands of another.**—The rules and principles already stated which apply to the purchase of property by a debtor in the name of another apply where a debtor, with intent to defraud his creditors, pays incumbrances by mortgage or other lien on the lands of his wife or another third person, and the land is chargeable in equity by the husband's creditors to the extent of the money so paid but cannot be subjected to a charge for a greater amount.⁵⁸ Likewise when a debtor loans his money, taking a bond and mortgage as security therefor in the name of his wife or another with the knowledge of his wife or such other person, to hinder creditors, the transaction cannot be upheld as a gift, but is fraudulent as against the creditors of the husband who have liens by judgment or attachment.⁵⁹ If a husband, for the purpose of defrauding his creditors, expend his money in erecting a house or making other improvements upon the land of his wife, child, or other third person, and the owner of the property participates in or has knowledge of such intent, it can be followed by creditors of the husband and the real estate, or the rents and profits thereof, sub-

Mo.—Patton v. Bragg, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730.

S. D.—Smith v. Tosini, 1 S. D. 632, 48 N. W. 299.

W. Va.—Martin v. Warner, 34 W. Va. 182, 12 S. E. 477; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Rose v. Brown, 11 W. Va. 122.

Contra.—Walters v. Brown (Tenn. Ch. App. 1898), 46 S. W. 777.

⁵⁷. Craig v. Gamble, 5 Fla. 430; Mercer v. Hooker, 5 Fla. 277; Laird v. Davidson, 124 Ind. 412, 25 N. E. 7; Godding v. Brackett, 34 Me. 27.

⁵⁸. Reel v. Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; Blair v. Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593. See also Farr v. Hauenstein (N. J. Ch. 1905), 62 Atl. 383.

⁵⁹. Conover v. Ruckman, 36 N. J. Eq. 493.

jected to the satisfaction of their claims to the extent of the value of such improvements.⁶⁰ But as to subsequent creditors, the rule does not apply, in the absence of an intent to defraud them known to or participated in by the owner of the property.⁶¹ With some qualifications the same rule applies where money is appropriated by a debtor to the payment of life insurance premiums.⁶²

§ 9. **Collusive and fraudulent legal proceedings.**—Debtors for the purpose of defeating the rights of creditors sometimes resort to collusive and fraudulent legal proceedings to cover up their property and shield it from creditors. Conveyances or transfers of property, although by means of attachment, judgment, execution, sale, or other judicial proceeding, if the result of collusive machination between the debtor and others to defraud creditors, or to give one creditor a preference injurious to other creditors, are fraudulent and void as against creditors, and will be revoked by the courts, and the property so disposed of, real or personal, subjected to the satisfaction of the claims of creditors.⁶³

60. *Isham v. Schafer*, 60 Barb. (N. Y.) 317, otherwise, as to his personal services. See also *Improvements, rents and profits of real estate*, chap. IV, § 24, *infra*.

But where the conveyance was valid in its inception, expenditures by a parent in paying off incumbrances and improving land previously voluntarily conveyed to his children by way of settlement does not render such prior conveyance invalid as against the parent's creditors. *Judson v. Courier Co.*, 15 Fed. 541.

61. *Robinson v. Huffman*, 15 B. Mon. (Ky.) 80, 61 Am. Dec. 177; *Caswell v. Hill*, 47 N. H. 407; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, 5 L. Ed. 603.

62. See *Payment of premiums for life insurance*, chap. IV, § 21, *infra*.

63. *U. S.*—*James v. Milwaukee, etc., R. Co.*, 73 U. S. 752, 18 L. Ed. 885, collusive sale of a railroad under mortgage.

Ala.—*Cartwright v. Bamberger*, 90 Ala. 405, 8 So. 264, collusive attachment.

Ill.—*French v. Commercial Nat. Bank*, 199 Ill. 213, 65 N. E. 252; *Thomas v. Van Meter*, 62 Ill. App. 309, assignment of a beneficiary of a money decree for the purpose of defeating an intervening creditor, and sale by a master thereunder without consideration paid.

Ind.—*Wright v. Mack*, 95 Ind. 332.

Iowa.—*Milliman v. Eddie*, 115 Iowa, 530, 88 N. W. 964, a judgment of foreclosure held to be in effect a voluntary confession of judgment.

Ky.—*Yoder v. Standiford*, 7 T. B. Mon. 478, an arrangement between

§ 10. **Collusive judgments.**—A judgment at law and a sale of a debtor's property thereunder will be set aside in equity, although founded upon a just debt, if procured by collusion to be used as a cover to protect his property from other creditors, or for the purpose of giving a preference to one creditor or a part of his creditors over others, or otherwise intended to defraud creditors.⁶⁴ A creditor may show in a collateral proceeding that a judgment was procured through fraud of the debtor, or collusion

the debtor and the purchaser of his estate at sheriff's sale to extend the time to redeem, contrived to defraud other creditors, will not be construed as a mortgage to give it effect.

La.—Newman v. Baer, 50 La. Ann. 323, 23 So. 279; Haas v. Haas, 35 La. Ann. 885.

Mass.—Goddard v. Divoll, 42 Mass. 413, collusive judgment.

Miss.—Hyman v. Stadler, 63 Miss. 362, a collusive suit is one in which the parties who occupy ostensibly adverse positions are, in fact, in accord, and whose real though concealed purpose is to accomplish the same result.

Eng.—Bateman v. Ramsay, Sau. & Sc. 459.

64. *N. Y.*—Kingsley v. First Nat. Bank, 31 Hun, 329, insolvent corporation allowing judgments to be entered against it by consent before expiration of the time allowed for answering; Pitney v. Leonard, 1 Paige, 461, confessed judgment and pretended purchase under it held fraudulent and void.

U. S.—Sowles v. Witters, 55 Fed. 159, judgment by consent where there was no liability.

Cal.—Anderson v. Lassen County Bank, 140 Cal. 695, 74 Pac. 287.

Ga.—Beach v. Atkinson, 87 Ga. 288, 13 S. E. 591.

Ill.—French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

Ind.—Phelps v. Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156.

Ky.—Wilson v. Snelling, 3 Bush. 322.

La.—Anheuser-Busch Brew. Assoc. v. McGowan, 49 La. Ann. 630, 21 So. 766.

Mass.—Sartwell v. North, 144 Mass. 188, 10 N. E. 824; Lamb v. Smith, 132 Mass. 574; Pierce v. Jackson, 6 Mass. 242; Pierce v. Partridge, 3 Metc. 44, judgment by default for amount in excess of plaintiff's claim.

N. J.—Squier v. Mechanics' Nat. Bank, 35 N. J. Eq. 344; Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co., 33 N. J. Eq. 486; Wandling v. Thompson, 41 N. J. L. 309.

Pa.—Kohl v. Sullivan, 140 Pa. St. 35, 21 Atl. 247; Clark v. Douglass, 62 Pa. St. 408, creditors can attack a judgment on a verdict by evidence that it was taken by consent or default, or that the defence set up was a sham; Hall v. Hamlin, 2 Watts, 354; Gilbert v. Hoffman, 2 Watts, 66, 26 Am. Dec. 103; Foulk v. McFarlane, 1 Watts & S. 297, 37 Am. Dec. 467; Gaskill v. Benton, 14 Phila. 487.

Wis.—Bloodgood v. Meissner, 84 Wis. 452, 54 N. W. 772, by statute;

of both parties, with design to hinder, delay, or defraud him.⁶⁵ A judgment recovered against a debtor is not necessarily shown to be collusive and fraudulent so that it will be set aside as fraudulent by proof that the defendant voluntarily appeared and answered in the action,⁶⁶ or that he did not defend the action,⁶⁷ or that he entered appearance and confessed the indebtedness or otherwise facilitated the obtaining of the judgment,⁶⁸ or that he failed to plead the statute of limitations, which would have been a bar, and suffered judgment by default,⁶⁹ or that he admitted

Nassauer v. Techner, 65 Wis. 388, 27 N. W. 40.

Can.—King v. Duncan, 29 Grant Ch. (U. C.) 113; Knox v. Travers, 23 Grant Ch. (U. C.) 41; McDonald v. Boice, 12 Grant Ch. (U. C.) 48; Dickson v. McMahon, 14 U. C. C. P. 521, judgment and execution in excess of amount due.

Eng.—Edison Gen. Electric Co. v. Westminster, etc., Tramway Co., 66 L. J. P. C. 36, A. C. 193, 75 L. T. Rep. N. S. 438, 4 Manson, 244.

The fact that an execution is taken out with a view to hinder and delay creditors, and that it has such effect, does not render the judgment invalid as to creditors, where it was valid at its inception. Wilder v. Winne, 6 Cow. (N. Y.) 284.

65. Atlas Nat. Bank v. More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274; Anheuser-Busch Brewing Assoc. v. McGowan, 49 La. Ann. 630, 21 So. 766; Hall v. Hamlin, 2 Watts (Pa.), 354; Stevenson v. Nichols, 13 Grant Ch. (U. C.) 489; Miners' Trust Co. Bank v. Roseberry, 81 Pa. St. 309; In re Dougherty, 9 Watts & S. 189, 42 Am. Dec. 326; Building Assoc. v. O'Connor, 3 Phila. 453.

66. McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932;

McGoldrick v. Slevin, 43 Ind. 522; Bell v. Throop, 140 Pa. St. 641, 21 Atl. 408, an amicable action of ejectment. See also Wright v. Mack, 95 Ind. 332; Mathews v. Mack, 95 Ind. 431, where there was also other evidence of collusion. *Contra.*—Bass v. Woolf, 88 Ga. 427, 14 S. E. 589, under a statute.

67. Snarr v. Waddell, 24 U. C. Q. B. 165, although he defended actions by other creditors against him. *Contra.*—Beavan v. Wheat, 14 U. C. C. P. 51, where there were also other suspicious circumstances.

68. Hardin v. Kelley, 114 Fed. 353, nor can the judgment be impeached when it is based upon an actual *bona fide* indebtedness, because of an agreement by the plaintiff to hold the property obtained by means of the judgment for a certain time for the benefit of others who would contribute to the payment of the debt and expense of procuring the judgment.

69. Allen v. Smith, 129 U. S. 465, 9 Sup. Ct. 338, 32 L. Ed. 732, especially where there was sufficient in the relations of the parties and the circumstances of the case to warrant him in permitting judgment; Sloan v. Whalen, 15 U. C. C. P. 319.

service of the summons as of a date prior to the day of its actual service,⁷⁰ or that after the recovering of the judgment he released or waived his right of appeal or review for a consideration paid to him,⁷¹ or that he waived inquisition or stay of execution for a consideration, in order to hasten the collection of the judgment.⁷² It is not fraudulent conduct to abandon an effort to deprive an honest creditor of the whole or part of his debt, nor is one creditor hindered or delayed by ending an effort to hinder or delay another.⁷³

§ 11. **Confession of judgment.**—A confession of judgment and execution thereon not made for the legitimate purpose of collecting a debt, but designed to cover up the leviable property of the debtor and in pursuance of a collusive purpose between the parties to hinder, delay, and defraud creditors, will be set aside as fraudulent,⁷⁴ although it be shown that the debt was *bona*

70. *Peck v. Richardson*, 9 Hun (N. Y.), 567.

71. *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454, 17 N. E. 358; *Boylston v. Carver*, 11 Mass. 515; *Shibler v. Hartley*, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811.

72. *Shibler v. Hartley*, *supra*.

73. *Inglehart v. Thousand Island Hotel Co.*, *supra*.

74. N. Y.—*Galle v. Tode*, 148 N. Y. 270, 42 N. E. 673, *rev'g* on other grounds 74 Hun, 542, 26 N. Y. Supp. 633; *Hardt v. Schwab*, 72 Hun, 109, 25 N. Y. Supp. 402; *Wood v. Mitchell*, 53 Hun, 451, 6 N. Y. Supp. 232, 17 Civ. Proc. R. 346, confession of judgment in favor of infants as upon contract, for a cause of action in tort, without the appointment of a guardian *ad litem*; *Williams v. Brown*, 4 Johns. Ch. 682; *Burns v. Morse*, 6 Paige, 108, a judgment by confession on a debt not yet due and

amply secured, entered for the purpose of selling the judgment debtor's property thereon, so as to place it beyond the reach of his creditors, is void as to them; *Pitney v. Leonard*, 1 Paige, 461.

U. S.—*Sowles v. Witters*, 55 Fed. 159, judgment by confession for money not due; *Smith v. Schwed*, 9 Fed. 483.

Ala.—*Davidson v. Watts Min. Car Wheel Co.*, 121 Ala. 591, 25 So. 758, where property after the execution sale was to be turned over to and used by the debtor company; *Weingarten v. Marcus*, 121 Ala. 187, 25 So. 852.

Cal.—*Anderson v. Lassen County Bank*, 140 Cal. 695, 74 Pac. 287, judgment for more than is due; *Wilcoxon v. Burton*, 27 Cal. 228, 87 Am. Dec. 86.

Del.—*Newell v. Morgan*, 2 Harr. 225; *Taggart v. Phillips*, 5 Del. Ch. 237.

*vide.*⁷⁵ No difference exists between a voluntary conveyance of property for fraudulent purposes and such an alienation disguised under

Ill.—French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252; Argo v. Fox, 95 Ill. App. 610; Atlas Nat. Bank v. More, 40 Ill. App. 336, *affd.* 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274.

La.—Marx v. Meyer, 50 La. Ann. 1229, 23 So. 923.

Md.—Citizens F., etc., Ins. Co. v. Wallis, 23 Md. 173.

Mo.—Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82; Field v. Liverman, 17 Mo. 218; Loth v. Faconesowich, 22 Mo. App. 68.

Neb.—Pitkin v. Burnham, 62 Neb. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280, judgment not void, but voidable only in a proper proceeding brought by the parties attempted to be defrauded.

N. J.—Shallcross v. Deats, 43 N. J. L. 177; Wandling v. Thompson, 41 N. J. L. 309; Metropolitan Bank v. Durant, 22 N. J. Eq. 35; Jones v. Naughtright, 10 N. J. Eq. 298.

N. C.—Rollins v. Henry, 78 N. C. 342, a consent decree in action to recover land; Leroy v. Dickinson, 11 N. C. 223.

Ohio.—Bloomington v. Stein, 42 Ohio St. 168, an execution on a promissory note and warrant of attorney, given without consideration and when the maker was insolvent, is void.

Pa.—Clark v. Douglass, 62 Pa. St. 408; Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639, the giving and receiving judgment is something more than a fraudulent intention; it is something done in pursuance of the intention, and it is voidable by any person in a position to question it; Serfoss v. Fisher, 10 Pa. St. 184;

Nusbaum v. Louchheim, 1 Pa. Cas. 106, 1 Atl. 391; Yocum v. Kehler, 1 Walk. 84; Campbell v. Kent, 3 Pen. & W. 72; Ditchburn v. Jermyn, etc., Co-operative Assoc., 3 Pa. Dist. 635; Gaskill v. Benton, 14 Phila. 487; Building Assoc. v. O'Connor, 3 Phila. 453. See also Taylor's Appeal, 45 Pa. St. 71, judgment notes given by a firm to the creditors of a third person, with whom it was in collusion to defraud its creditors, without any dealings or communication with the creditors of such third person, are fraudulent as to the firm's creditors.

S. C.—Beattie v. Pool, 13 S. C. 379.

Tenn.—Hickerson v. Blanton, 2 Heisk. 160.

Wis.—Bloodgood v. Meissner, 84 Wis. 452, 54 N. W. 772; Nassauer v. Techner, 65 Wis. 388, 27 N. W. 40.

Can.—Martin v. McAlpine, 8 Ont. App. 675; McGee v. Baird, 3 Ont. Pr. 9; Swayne v. Ruttan, 6 U. C. C. P. 399; Servos v. Tobin, 2 U. C. Q. B. 530; Knapp v. Forrest, 6 U. C. Q. B. O. S. 577, gross usury in taking confession of judgment; Bergin v. Pindar, 3 U. C. Q. B. O. S. 574, fictitious debt.

Eng.—Edison Gen. Electric Co. v. Westminster Tramway Co., 66 L. J. P. C. 36, A. C. 193, 75 L. T. Rep. N. S. 438, 4 Manson 244, if the fraudulent intent is proven, it is immaterial that the consent to the judgment was given under pressure; Bateman v. Ramsey, Sau. & Sc. 459.

Judgment confessed to endorser.—Before maturity of a note held by a bank which has discounted it for the maker, there is nothing due

the forms of a confession of judgment.⁷⁶ The fact that the debt for which the judgment was confessed was a just one, owing from the judgment debtor to the judgment creditor, will not exonerate the latter from refunding any sum acquired by him in the attempt to place the debtor's property beyond the reach of the other creditors, for the benefit of the failing debtor.⁷⁷ Such a judgment may be collaterally attacked.⁷⁸ A confession of judgment may be rendered fraudulent or the execution thereon rendered dormant and fraudulent, as against subsequent as well as existing creditors, by the acts of the judgment creditor.⁷⁹ A confession of judgment, in order to be fraudulent as against creditors must be either voluntary or made with fraudulent intent participated in by or known to the creditor in whose favor it is confessed, and, in the absence of statutory prohibition, when taken in the ordinary course of business, and without any intent that it should operate as a preferential assignment, or to hinder and delay creditors, although its effect may be to give a preference and thereby hinder and delay other creditors, it is not fraudulent as

from the maker to the endorser, and a confession of judgment on the note by the maker in favor of the endorser will be set aside at the instance of a subsequent judgment creditor of the maker. *Forrester v. Strauss*, 18 N. Y. Supp. 41. See Consideration; contingent liability, chap. VIII, § 12, *infra*.

75. *Smith v. Schwed*, 9 Fed. 483; *Jones v. Naughtright*, 10 N. J. Eq. 298; *Bunn v. Ahl*, 29 Pa. St. 387, 72 Am. Dec. 639; *Beattie v. Pool*, 13 S. C. 379.

76. *Muse v. Yarborough*, 11 La. 530.

77. *Hardt v. Schwab*, 72 Hun (N. Y.) 109, 25 N. Y. Supp. 402.

78. See Collusive judgments, chap. II, § 10, note 65, *supra*.

An action by a judgment creditor to set aside executions issued on judgments confessed by the

debtor before the recovery of plaintiff's judgment is not a collateral attack on the judgments on which such executions were issued. *Forrester v. Strauss*, 18 N. Y. Supp. 41.

79. *Field v. Liverman*, 17 Mo. 218, if the judgment creditor direct the sheriff to hold up his execution, and not to sell or proceed to make the money until he shall give further orders and until he shall find younger executions crowding in; *Serfoss v. Fisher*, 10 Pa. St. 184, a voluntary judgment confessed by one who is not indebted, with design to defeat a supposed liability which did not exist, is rendered fraudulent as to subsequent creditors by reviving it by *scire facias* and issuing an execution thereon; *Campbell v. Kent*, 3 Penr. & W. (Pa.) 72.

A judgment note given by a merchant in contemplation of in-

to creditors.⁸⁰ Judgment creditors of a corporation, in the absence of fraud, cannot question the right of an attorney to enter a judg-

solvency, without consideration, is fraudulent, not only as to creditors of the maker existing at the time of its execution, but also as to those existing at the time of its intended enforcement. *Chronister v. Anderson*, 73 Ill. App. 524.

80. *N. Y.*—*Rutherford v. Schattman*, 119 N. Y. 604, 23 N. E. 440; *Barker v. Franklin*, 8 Am. B. R. 468, 37 Misc. Rep. 292, 75 N. Y. Supp. 305, where creditors of an insolvent, without taking any action themselves, accept the advantage which he gives them by conveyance of his property as a part of a fraudulent scheme, the conveyance will be set aside.

U. S.—*Hardin v. Kelley*, 144 Fed. 353.

Ala.—*McBroom v. Rives*, 1 Stew. 72, the owner of a deed of trust may, on discovering a defect therein, take judgment by confession against his debtor, and sell the property on execution.

Cal.—*Pond v. Davenport*, 44 Cal. 481.

Ill.—*Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335, *affg.* 24 Ill. App. 178, a provision in a warrant of attorney to confess judgment, for including therein the creditor's attorney's fees, is not fraudulent.

La.—*Ellis v. Fisher*, 10 La. Ann. 482.

Minn.—*Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741.

Mo.—*Hard v. Foster*, 98 Mo. 297, 11 S. W. 760.

N. J.—*Vanderveere v. Gaston*, 25

N. J. L. 615; *Jones v. Naughtright*, 10 N. J. Eq. 298.

N. C.—*Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765; *Rollins v. Henry*, 78 N. C. 432, consent decree in an action to recover land; *Finley v. Smith*, 24 N. C. 225.

Pa.—*Page v. Williamsport Suspender Co.*, 191 Pa. St. 511, 43 Atl. 345; *Lowery v. Coulter*, 9 Pa. St. 349, confession of judgment without the intervention of the creditor and an immediate issue of execution at the creditor's request; *Kline v. O'Donnell*, 11 Pa. Co. Ct. 38; *Ballou v. Minard*, 2 Brewst. 560, giving of a judgment note.

S. C.—*Drake v. Steadman*, 46 S. C. 474, 24 S. E. 458.

Wis.—*Pirie v. Stern*, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103, provision for creditor's attorney's fee in a warrant of attorney to confess judgment.

Eng.—*Meux v. Howell*, 4 East, 1.

A judgment confessed for a bona fide debt should not be set aside on the mere suspicion that its confession was produced by the same fraudulent intent as the confession of other judgments and a general assignment, which was also set aside for fraud, where the judgment, and the proofs relating to it, are not connected with the other judgments, or with any other part of the litigation, but are separate and distinct. *Illinois Watch Co. v. Payne*, 11 N. Y. Supp. 408, *aff'd* 132 N. Y. 597, 39 N. E. 1151. See also *Effect of fraudulent conveyance*—Several transactions, chap. III, § 3, *infra*.

ment by confession against the corporation, in pursuance of a warrant of attorney in a judgment note.⁸¹

§ 12. **Statutory requirements as to confessions of judgment.**—In some of the states the statutes provide that a confession of judgment shall be attended with certain formalities, such as an affidavit or statement of the indebtedness, the particulars of the indebtedness, the facts and circumstances out of which it arose, good faith, and so forth. Under these statutes the failure to make all the disclosures required by the statute has been held in some cases to render the judgment *prima facie*,⁸² and in others conclusively,⁸³ fraudulent and void both as against existing and subsequent creditors. For example, a confession of judgment will be fraudulent and void as to creditors, unless the statement contains such a recital of facts out of which the debt arose as to identify the transaction and enable inquiries to be made;⁸⁴ if the

Preference not fraudulent in law.—A judgment confessed by an insolvent to secure a *bona fide* creditor, although it be intended, and has the effect, to give him a preference over other creditors, is not fraudulent in law. *Braden v. O'Neil*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761. See Preferences, chap. XI, *infra*. Nor is it fraudulent because the amount is sufficient to cover the debtor's contingent liability on endorsements as well as his actual indebtedness. *Id.* See also Executory or contingent considerations, chap. VIII, §§ 7-12, *infra*. *Potter v. Pickle*, 2 Ont. Pr. 391; *Swayne v. Ruttan*, 6 U. C. C. P. 399.

81. *Chicago Tip, etc., Co. v. Chicago Nat. Bank*, 74 Ill. App. 439.

82. *Pond v. Davenport*, 44 Cal. 481; *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521.

83. See cases cited in following notes to this section.

84. *N. Y.*—*Neusbaum v. Keim*, 24 N. Y. 325; *Lanning v. Carpenter*, 20 N. Y. 447, it is not necessary to recite that the sum confessed is justly due or to become due; *Dunham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406; *Flour City Nat. Bank v. Doty*, 41 Hun, 76; *Butts v. Schieffelin*, 5 Civ. Proc. R. 415; *Acker v. Acker*, 1 Abb. Dec. 1, 1 Keyes, 291; *McKee v. Tyson*, 10 Abb. Pr. 392; *Claffin v. Sanger*, 31 Barb. 36, 11 Abb. Pr. 338; *Clements v. Gerow*, 30 Barb. 325; *Bonnell v. Henry*, 13 How. Pr. 142; *Purdy v. Upton*, 10 How. Pr. 494; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329, judgment by confession on warrant of attorney; *Bank of Kinderhook v. Jenison*, 15 How. Pr. 41; *Thompson v. Van Vechten*, 5 Abb. Pr. 458; *Marks v. Reynolds*, 12 Abb. Pr. 403, 20 How. Pr. 338.

Cal.—*Pond v. Davenport*, 44 Cal. 481, 45 Cal. 225; *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66; *Cordier v. Schloss*, 12 Cal. 143, 18 Cal.

statement as to the indebtedness is defective or insufficient;⁸⁵ where it merely sets out a promissory note as the consideration for the indebtedness;⁸⁶ where it recites merely that it is based upon a promissory note given for goods sold;⁸⁷ or a draft, setting out a copy thereof;⁸⁸ or where the affidavit is insufficient;⁸⁹ or where there is no statement;⁹⁰ or affidavit.⁹¹ But a confession of judgment is not fraudulent and void as to creditors because the statement does not enumerate each item of the account constituting the indebtedness as in a specific bill of particulars;⁹² or where a discrepancy in an item is the result of a clerical error;⁹³ or where the statement does not contain a minute description of the goods sold, or time and place and terms of sale of each particular parcel.⁹⁴ A statement that the consideration of the judg-

576; *Richards v. McMillan*, 6 Cal. 419, 65 Am. Dec. 521.

Iowa.—*Miller v. Clarke*, 37 Iowa, 325.

Minn.—*Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741; *Wells v. Gieseke*, 27 Minn. 478, 8 N. W. 380, judgment will be void as to those liabilities insufficiently stated, but valid as to the others.

Mo.—*Teasdale Commission Co. v. Van Hardenberg*, 55 Mo. App. 326; *Stern v. Mayer*, 19 Mo. App. 511; *McHenry v. Shepard*, 2 Mo. App. 378.

Wash.—*Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

Wis.—*Thompson v. Hintgen*, 11 Wis. 112.

85. *N. Y.*—*Winnebrenner v. Edgerton*, 30 Barb. 185; *Van Beck v. Shuman*, 13 How. Pr. 472.

Cal.—*Pond v. Davenport*, 45 Cal. 225.

Iowa.—*Kennedy v. Lowe*, 9 Iowa, 580.

86. *N. Y.*—*Chappel v. Chappel*, 12 N. Y. 215, 64 Am. Dec. 496; *Hoppock*

v. Donaldson, 12 How. Prac. 141; *Mann v. Brooks*, 7 How. Pr. 449.

Mo.—*How v. Dorscheimer*, 31 Mo. 349.

87. *N. Y.*—*Clafin v. Songer*, 11 Abb. Pr. 338; *Moody v. Townsend*, 3 Abb. Pr. 375.

Iowa.—*Bernard v. Douglass*, 10 Iowa, 370.

Mo.—*Bryan v. Miller*, 28 Mo. 32, 75 Am. Dec. 107, the statement may be amended but not so as to interfere with the existing rights of other judgment creditors.

88. *Davidson v. Alexander*, 84 N. C. 621.

89. *Ingram v. Robbins*, 33 N. Y. 409, 88 Am. Dec. 393; *Sheppard v. Sheppard*, 10 N. J. L. 250.

90. *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481.

91. *Cliver v. Applegate*, 5 N. J. L. 479, 551.

92. *Vanfleet v. Phillips*, 11 Iowa, 558.

93. *Hard v. Foster*, 98 Mo. 297, 11 S. W. 760.

94. *Gandall v. Finn*, 33 How. Pr.

ment is borrowed money and that there is now due a certain sum;⁹⁵ or that the indebtedness is evidenced by a note given for borrowed money, describing the note, though failing to state that the debt is justly due or to become due,⁹⁶ has been held to be sufficient.

§ 13. **Foreclosure of mortgages and deeds of trust.**—A collusive and fraudulent sale under foreclosure of a mortgage or under a deed of trust of real or personal property, either under a power contained therein or by legal proceedings, will be set aside at the suit of creditors of the mortgagor or grantor as fraudulent as against them. Sales of this character where the facts clearly established collusion and fraud are referred to in the note below.⁹⁷ Lands so fraudulently conveyed may be sold on execution

(N. Y.) 444, 2 Abb. Dec. 232, 1 Keyes, 217.

95. *Miller v. Clarke*, 37 Iowa, 325.

96. *Claffin v. Dodson*, 111 Mo. 195, 19 S. W. 711.

97. *N. Y.*—*Matter of Fuller*, 35 Hun, 162, where it is reasonably apparent that an assignment and foreclosure of a mortgage was to cut off liens to the prejudice of the mortgagor's creditors, a creditor may procure the setting aside of the foreclosure, if intervening rights can be protected.

Ill.—*Laffin v. Central Pub. House*, 52 Ill. 432, a statute rendering liable to attachment property sold with intent to hinder and delay creditors, includes mortgaged chattels, so sold by fraudulent collusion between the mortgagor and mortgagee as to prevent any surplus proceeds from arising, although there was no fraud in making the mortgage.

Ind.—*Wright v. Mack*, 95 Ind. 332, mortgages given shortly before a voluntary assignment and soon thereafter foreclosed under circumstances showing collusion justify creditors

suing for the conversion of the property.

Iowa.—*Milliman v. Eddie*, 115 Iowa, 530, 88 N. W. 964, a judgment of foreclosure of a mortgage, which had been paid but assigned to the mortgagor's children for the purpose of hindering and delaying creditors, is in effect a voluntary confession of judgment, and fraudulent and void as against the mortgagor's creditors.

Mo.—*Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308, the fact that a trust deed was valid and made in good faith will not protect a purchaser thereunder, as against the grantor's creditors, where the sale and purchase were collusively and fraudulently made for the purpose of covering up the grantor's equity.

U. S.—*Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535, sheriff's deed and conveyance made in pursuance of a bank's scheme devised to carry the title of all real estate on which it had foreclosed mortgages into a realty corporation, whose stock it held, and to carry the notes and mortgages of

of a creditor as though the conveyance had not been made; and the purchaser upon proof of the fraud, is entitled to a decree vesting the title in him, and the fraudulent grantee will be declared trustee for him.⁹⁸ But it has been held that a creditor for whose benefit land has been conveyed by a trust deed in the nature of a mortgage, and whose claim is three times greater than the value of the land, may cause it to be conveyed as a gift to the debtor's children without affording to other creditors ground of complaint.⁹⁹ And where an equity of redemption is attached, it has been held that the debtor may lawfully remain passive, and suffer the foreclosure to be consummated, and may even persuade another creditor to take his interest as security, and assign it to him, and that such an arrangement is not a fraud on the attaching creditor, although the assignee knew of the existence of the attachment; and that it is not a fraud on the attaching creditor, if the assignee makes an agreement with the mortgagee that the latter shall hold the mortgage until the time for redemption has expired, and then convey the land to the assignee, on being paid by him the amount secured by the mortgage.¹ Other cases wherein the courts have held that the facts proven did not establish collusion or fraud are cited in the note below.²

the latter, representing the amounts due by the former mortgagors, at par among its assets, held to be voidable at the election of the bank's creditors; *James v. Milwaukee, etc., R. Co.*, 6 Wall. 752, 18 L. Ed. 885, sale of a railroad under mortgage to secure bonds was fraudulent as against the company's creditors where the notice of sale grossly misstated the amount due.

Can.—*King v. Duncan*, 29 Grant Ch. (U. C.) 113, fictitious breach of chattel mortgage and judgment before expiration of period of credit; *Watson v. McCarthy*, 10 Grant Ch. (U. C.) 416, a sale under the power in a mortgage set aside as collusive

and tending to delay creditors, within 13 Eliz., chap. 5.

98. *Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308.

99. *Van Riswick v. Spalding*, 117 U. S. 370, 6 Sup. Ct. 788, 29 L. Ed. 913.

1. *Danforth v. Roberts*, 20 Me. 307.

2. *Mich.*—*Reeves v. Miller*, 121 Mich. 311, 80 N. W. 19, creditors cannot reach land which their debtor owned, where one having a mortgage thereon foreclosed it, without any fraudulent design, and after expiration of the time to redeem, sold it to a third person, although the mortgagee bid in the property for a sum much below its value, and sold it

§ 14. **Execution and other judicial sales.**—The statutes of frauds reach fraudulent executions as well as fraudulent judgments.³ Fraud pollutes public as well as private sales, and creditors may attack and set aside as fraudulent a conveyance by a debtor through the medium of a levy under a collusive and fraudulent execution and a judicial sale thereunder, or other collusive and fraudulent judicial sale, with intent to hinder, delay, or defraud creditors of the judgment or execution debtor by covering his property or placing it in another's name, or securing it or any part of it for the benefit of the debtor or his family, and thus shielding it from creditors.⁴ The fact that the sale of the prop-

cheap, and although the purchaser from him bought at the suggestion of the debtor, and advanced him money to carry on business there, it not appearing the debtor contributed anything to the purchase, or was promised any interest in the property or its proceeds.

S. C.—*Magruder v. Clayton*, 29 S. C. 407, 7 S. E. 844, where, in a suit to set aside as fraudulent sales of chattels made under a lien and a mortgage, all the parties connected with the sales testify that they were entirely fair, and it appears that the lien sale was made by the sheriff, and that both were regularly advertised, a finding that they were not fraudulent is not clearly against the weight of evidence, though the sales were made hastily, and without proper attention to detail, and the property was not immediately removed. *Bickley v. Norris*, 2 Brev. 252, where negroes were mortgaged and sold by virtue of the mortgage, and the mortgagee permitted a friend with money to purchase them in his own name, as a trustee for the mortgagor's children, and the trustee accordingly purchased and took a conveyance to him-

self absolutely, subject to the secret trust, the conveyance, if *bona fide*, was good, and not within the statute of Elizabeth.

3. *Wilder v. Fonday*, 4 Wend. (N. Y.) 100.

4. *N. Y.*—*Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307; *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110; *Wilder v. Fonday*, 4 Wend. 100; *Burnell v. Johnson*, 9 Johns. 343.

U. S.—*Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547.

Ala.—*Forrest v. Camp*, 16 Ala. 642.

Ark.—*Miller v. Fraley*, 21 Ark. 22, where upon a sale of real estate to satisfy an execution the purchase was made at the request and with the means of the judgment debtor, and the purchaser received a deed, agreeing to hold for the judgment debtor's benefit, the sale was fraudulent and void as against creditors of the judgment debtor, and the purchaser held, in equity, in trust for their benefit, and a grantee of such purchaser, with notice of the fraud, did not get a valid title.

Del.—*Purington v. Chandler*, 5 Harr. 394.

erty on execution was under a valid and unsatisfied judgment regularly and lawfully enforced does not alter the character of the transaction, if it was done with intent to defraud creditors of the judgment debtor.⁵ The sale of property on execution for the full amount of a *bona fide* judgment, where the whole or a part of the judgment is satisfied,⁶ or a sale on execution where the debtor pays the whole or a part of the purchase money,⁷ or where the debtor procures the sale to a purchaser at a grossly inadequate

Ga.—Smith v. Dobbins, 87 Ga. 303, 33 S. E. 496.

Ind.—Buck v. Voreis, 89 Ind. 116.

Ky.—Yoder v. Standiford, 7 T. B. Mon. 478, an arrangement between the debtor and the purchaser at sheriff's sale to extend the time to redeem.

La.—Lee v. Whitehead, 8 La. Ann. 81; Lawrence v. Young, 1 La. Ann. 297, consent of debtor to a sale without formalities of law.

Miss.—White v. Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112; Stovall v. Farmers', etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

Mo.—Morrison v. Herrington, 120 Mo. 665, 25 S. W. 560; Dallam v. Renshaw, 26 Mo. 533, the creditors may treat the execution sale and the sheriff's deed as nullities; Carter v. Shotwell, 42 Mo. App. 663.

N. C.—Den v. Erwin, 18 N. C. 569, other judgment creditors may treat the sale and deed as nullities and subject the property at law to the satisfaction of their debts.

Ohio.—Edgington v. Williams, Wright, 439.

Pa.—Hall v. Hamlin, 2 Watts, 354; Mitchell v. Gendell, 7 Phila. 107.

Tex.—Smith v. Boquet, 27 Tex. 507, property bid in by the debtor through an agent in trust for himself or family.

Wis.—Reynolds v. Vilas, 8 Wis. 471, 76 Am. Dec. 238.

Can.—Servos v. Tobin, 2 U. C. Q. B. 530; Doe v. Van Koughnet, 5 U. C. Q. B. O. S. 246.

A fraudulent vendee gains no title to the land by a sheriff's sale, nor interest in it, notwithstanding as innocent creditor may, by that very sale, obtain a good title to the money. Foulk v. McFarlane, 1 Watts & S. (Pa.) 297, 37 Am. Dec. 467.

A sale on execution to the administrator of the judgment debtor, who paid no money, but purchased in trust for the creditors and heirs, is fraudulent as to creditors. Hays v. Heidelberg, 9 Pa. St. 203.

A sale by an administrator to a trustee, for the benefit of the heirs and creditors is fraudulent and void. Piatt v. St. Clair, 6 Ohio, 227, Wright, 261.

5. Decker v. Decker, 108 N. Y. 128, 15 N. E. 307; Crary v. Sprague, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110.

6. Wilder v. Fondoy, 4 Wend. (N. Y.) 100; Booth v. Moret, 1 Brev. (S. C.) 216.

7. Dawson v. Holbert, 4 La. Ann. 36; Burke v. Murphy, 27 Miss. 167, and a purchaser would not be protected though he repaid the debtor the amount furnished by the latter; Den v. Erwin, 18 N. C. 569.

price or a price much below its real value,⁸ is fraudulent and void as to creditors. The use of sheriff's deeds and other legal instruments to effect a fraudulent conveyance of property is no bar to its avoidance.⁹ Preventing competitive bidding at an execution or other judicial sale, whereby the purchaser is enabled to buy the property at a reduced price or for less than he otherwise would, may render the sale fraudulent and void as against other creditors.¹⁰ A sheriff's sale cannot, however, be considered a mere simulation and be set aside as fraudulent as against creditors where there is no evidence of any participancy by the seizing creditor or purchaser in any fraudulent purpose of the judgment debtor, or showing that the purchase was made with other than honest intent.¹¹ In the absence of actual fraud, a sale is not fraudulent as to the creditors of the judgment debtor, although the purchaser subsequently convey, or cause the sheriff to convey, the property to the debtor or his wife or children, or in trust for them.¹² A sale on execution is not *per se* fraudulent as against the debtor's creditors because of an agreement between the judgment

8. *Lawrence v. Young*, 1 La. Ann. 297; *Worthy v. Caddell*, 76 N. C. 82.

9. *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Forrest v. Camp*, 16 Ala. 642; *Buck v. Voreis*, 89 Ind. 116.

10. *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547, executor's sale of real estate under orders of the probate court; *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179; *Simonton v. Davis*, 4 Strob. Eq. (S. C.) 133; *Carson v. Law*, 2 Rich. Eq. (S. C.) 296, although the motive for so doing was one of benevolence towards the debtor's family.

11. *H. B. Claflin Co. v. Lass*, 17 Colo. App. 156, 67 Pac. 910; *Holmes v. Barbin*, 15 La. Ann. 553. The taking out of an execution is not rendered fraudulent as to creditors merely because it is taken with a

view to hinder and delay them, if the judgment was valid in its inception. *Wilder v. Winne*, 6 Cow. (N. Y.) 284.

A purchase, by an attorney, of his client's land at execution sale in the proceedings in which the attorney is employed, is not presumptively fraudulent as to the client's creditors. *Fisher v. McInerney*, 137 Cal. 38, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

12. *McLaughlin v. McLaughlin*, 91 Pa. St. 462; *McMahan v. Dawkins*, 22 S. C. 314.

The judgment debtor's advancing money to a third person, to enable him to purchase and take an assignment of the certificate of sale, and thus keep it in force, is not, if no fraud is practiced, invalid as against subsequent creditors.

debtor and the purchaser to the advantage of the former, where the debtor's means were not used in procuring it.¹³ But a sale is *prima facie* fraudulent as to creditors where the property is left by the vendee in the possession of the defendant in the execution for a long time.¹⁴

§ 15. **Collusive attachment.**—The law recognizes no distinction between a voluntary conveyance of property in fraud of creditors and such an alienation disguised under the forms of judicial proceedings, and the court will declare fraudulent and void and set aside a collusive or fraudulent attachment or sale thereunder, at the suit of creditors of the attachment defendant who are hindered, delayed, or defrauded thereby.¹⁵ But where the claim is just and the attachment is in good faith, and there is nothing to impeach it but unusual and suspicious circumstances, the courts have refused to set it aside.¹⁶ Compromising a suit, after obtaining an attachment, for less than was alleged to be due, is no evidence that the prosecution of the attachment was

Rankin v. Arndt, 44 Barb. (N. Y.) 251.

13. Smith v. Dobbins, 87 Ga. 303, 14 S. E. 496, where the purchaser gave the debtor a year's time to refund the purchase money with interest, and agreed on his doing so to convey the land to him, the plaintiff in *fieri facias* not participating in the agreement, the sale is not fraudulent; nor because of a stipulation that the debtor should have the crop then upon the land without paying for it, or that the succeeding year's crop should be the property of the purchaser in case the debtor failed to take the land, nor the fact that the purchaser afterwards paid the debtor or his assign for a release from the agreement; Chicago, etc., R. Co. v. Watson, 113 Ill. 195; Parsons v. Black, 2 Grant Cas. (Pa.) 339.

14. Buck v. Voreis, 89 Ind. 116; Stovall v. Farmers', etc., Bank, 8 Sm. & M. (Miss.) 305, 47 Am. Dec. 85, for two years or more. See Retention of possession or apparent title, chap. XII, *infra*.

15. La.—Newman v. Baer, 50 La. Ann. 323, 23 So. 279; Haas v. Haas, 35 La. Ann. 885.

Mass.—Pierce v. Jackson, 6 Mass. 242.

Miss.—Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70.

Mo.—Norton v. Thiebes Stierling Music Co., 82 Mo. App. 216, but an attachment does not hinder or delay creditors where the debtor has no property that can be attached.

Tex.—Zadik v. Schafer, 77 Tex. 501, 14 S. W. 153.

16. Cartwright v. Bamberger, 90 Ala. 622, 14 So. 477; Hyman v. Stadler, 63 Miss. 362.

fraudulent as to other creditors of the debtor.¹⁷ A writ of attachment issued collusively between a creditor and a debtor, insolvent or not, for the purpose of giving a prohibited preference which is injurious to other creditors, or with intent to effect a fraudulent transfer of the debtor's property, is a void suit or proceeding within the meaning of a statute, declaring void a "suit commenced" with intent to defraud creditors.¹⁸ And the ineffectual resort to such judicial machinery with the collusive purpose of transferring the debtor's property is an attempt to make a fraudulent transfer within the meaning of the statute.¹⁹ That an attachment is sued out without just ground therefor is a wrong against the debtor, but such attachment is not vulnerable to attack on that ground by ordinary creditors' bill by other creditors.²⁰ But if a party not a creditor makes an attachment which is invalid, but which is not objected to by the debtor, the other creditors can have relief in equity by a bill to annul the judgment.²¹

§ 16. **Fraudulent organization of corporation.**—A transfer or conveyance of property by a debtor, although carried out by the device of a corporation organized with all the forms and requirements of law, if made with the design of defrauding creditors, is vitiated by such fraud and rendered void, and the property transferred may be taken in execution as that of the debtor.²² Where a corporation is organized and the property or business of a debtor is transferred to it in exchange for stock and without

17. *Alexander v. Hemrich*, 4 Wash. 727, 31 Pac. 21.

18. Under Ala. Code, § 2156. *Butler v. Feeder*, 130 Ala. 604, 31 So. 799; *Stern v. Butler*, 123 Ala. 606, 26 So. 359, 82 Am. St. Rep. 146; *First Nat. Bank v. Acme White Lead, etc., Co.*, 123 Ala. 344, 26 So. 354; *Rice v. Eiseman*, 122 Ala. 343, 25 So. 214; *Collier v. Wertheimer-Schwartz Shoe Co.*, 122 Ala. 320, 25 So. 191; *Gassenheimer v. Kellogg*, 121 Ala. 109, 26 So. 29; *Comer v.*

Heidelberg, 109 Ala. 220, 19 So. 719; *Rice v. Less*, 105 Ala. 298, 16 So. 917, attachments obtained by relatives of an insolvent; *Cartwright v. Bamberger*, 90 Ala. 405, 8 Sp. 264.

19. *Comer v. Heidelberg*, *supra*; *Cartwright v. Bamberger*, *supra*.

20. *Meyrovitz v. Glaser*, 132 Ala. 103, 31 So. 360.

21. *Henderson v. Thornton*, 37 Miss. 448, 75 Am. Dec. 70.

22. *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372.

other consideration and the business is thereafter carried on by it, or where the members of a corporation form a new corporation or consolidate with other corporations, to whom the assets of the former corporation are transferred, and stock is received therefor to the amount of the agreed value of such assets, for the purpose of defeating existing creditors, the transaction is fraudulent and void in law as to such creditors, and the property so transferred or the stock representing it may be reached and subjected by creditors to the satisfaction of their claims,²³ provided the title has

23. *N. Y.*—Booth v. Bunce, *supra*; Third Nat. Bank v. Keefe, 30 Misc. Rep. 400, 63 Supp. 1049; Persee, etc., Paper Works v. Willett, 24 N. Y. Super. Ct. 131, 19 Abb. Prac. 416.

U. S.—Hibernia Ins. Co. v. St. Louis, etc., Transp. Co., 13 Fed. 516.

Ala.—Metcalf v. Arnold, 110 Ala. 180, 20 So. 301, 132 Ala. 74, 32 So. 763, where all the property of the judgment debtors was turned over to a corporation for stock of the corporation issued to them and their wives.

Colo.—Colorado Trading, etc., Co. v. Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954, a creditor defrauded may proceed against the property by attachment.

D. C.—Clark v. Walter T. Bradley Coal, etc., Co., 6 App. Cas. 437.

Ga.—Buckwalter v. Whipple, 115 Ga. 484, 41 S. E. 1010, reorganization of corporation; Planters', etc., Bk. v. Willeo Cotton Mills, 60 Ga. 168.

Ill.—Hinkley v. Reed, 182 Ill. 440, 55 N. E. 337, where a partnership made a fraudulent transfer of its property to a corporation in exchange for stock, the subsequent assignments for the benefit of creditors by the partners of the stock, and by the corporation of all its assets, were void.

Iowa.—Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441.

Kan.—Kellogg v. Douglass County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596, an attachment of the property conveyed to the corporation sustained.

Md.—Chatterton v. Mason, 86 Md. 236, 37 Atl. 960.

Mass.—Allen v. French, 178 Mass. 539, 60 N. E. 125.

Mich.—Plant v. Billings-Drew Co., 127 Mich. 11, 86 N. W. 399, creditors cannot attack the corporation as garnishee, since the property in its new form of stock is still subject to levy and sale to satisfy the debt owing the creditors.

Minn.—Benton v. Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265.

N. J.—Mulford v. Doremus (Ch. 1900), 45 Atl. 688; Terhune v. Skinner, 45 N. J. Eq. 344, 19 Atl. 377; Van Campen v. Ingram (Ch.), 12 Atl. 537.

Ohio.—First Nat. Bank v. F. C. Trebein Co., 59 Ohio St. 316, 52 N. E. 834.

Or.—Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288.

Pa.—Montgomery Web Co. v. Dielnelt, 133 Pa. St. 585.

not been acquired by a *bona fide* purchaser, but they cannot take both the property and the consideration therefor.²⁴ The right of creditors to seize as their debtor's property transferred by him under an arrangement void as to them is not affected by the fact that the property has been conveyed to a corporation organized for the purpose of purchasing it, and continuing the debtor's business, especially where it has paid nothing but its own stock, which had no value aside from the property acquired.²⁵ A corporation fraudulently organized by persons for their own benefit, and to which they fraudulently transfer their property for the purpose of defrauding their creditors, and whose stock is wholly owned or controlled by them, cannot be regarded as an innocent purchaser of that property for value.²⁶ Such transactions are not, however, *per se* fraudulent as to creditors. There must be evidence of intent to defraud.²⁷ Under a statute providing that a

Tenn.—Bristol Bank, etc., Co. v. Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

Wis.—Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114.

Can.—Rielle v. Reid, 26 Ont. App. 54, *applying* Salomon v. Salomon, A. C. 22, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson, 89, 45 Wkly. Rep. 193.

24. Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Kellogg v. Douglass County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

25. Pennsylvania Knitting Co. v. Bibb Mfg. Co., 21 Pa. Co. Ct. 537.

26. Clark v. Walter T. Bradley Coal, etc., Co., 6 App. D. C. 437; and other cases in note 23, *supra*.

27. *N. Y.*—Kessler v. Levy, 11 Miss. Rep. 275, 32 N. Y. Supp. 260, where a firm formed a corporation to which they transferred all the firm assets in consideration of all the stock except a small amount issued for cash paid the company, and

offered the stock of the company to their creditors, the transfer was not fraudulent; Persse, etc., Paper Works Co. v. Willett, *supra*.

U. S.—In re A. L. Robertshaw Mfg. Co., 133 Fed. 556.

Ala.—Henderson v. Perryman, 114 Ala. 647, 22 So. 24.

Ga.—Planters', etc., Bank v. Willetto Cotton Mills, 60 Ga. 168.

Ill.—Kingman & Co. v. Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169, where a debtor, after notice to all his creditors and with the consent of most of them except complainant, in pursuance of a plan therefor previously outlined to his creditors, formed a corporation, and conveyed to it all his property, and received in consideration therefor shares of stock, which he pledged to secure money with which to settle his debts, the transaction was neither fraudulent in law nor in fact, so as to support a bill by a judgment creditor to compel the application of the

debtor may pay one creditor in preference to another, a debtor has a right to organize a corporation, transfer his property to it for stock, and transfer the stock to a creditor in payment of the debt, so long as such transfers are not made with intent to defraud.²⁸

§ 17. Waste or loss through debtor's negligence.—A creditor's bill to set aside a conveyance alleged to be fraudulent cannot be maintained on the ground of fraud on the part of others practiced on the debtor whereby he was wronged out of his property, or on the ground that the debtor has wasted his property or other-

property so conveyed to the satisfaction of his judgment.

Iowa.—Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441, where a debtor organized a corporation to take title to land, the fact that others invested money therein, and transferred property in consideration of stock received, was sufficient to show that the scheme was not one to defraud creditors, and the mere fact that assignments of stock were made to such debtor's relatives was not alone sufficient to show that the transaction was fraudulent.

Pa.—Coaldale Coal Co. v. State Bank, 142 Pa. St. 288, 21 Atl. 811, where a solvent mercantile firm transferred its business and all its property to a corporation of which the members of the firm constituted the stockholders, and the partners afterwards pledged most of their stock to secure certain creditors, the transactions were not in fraud of the unsecured creditors; Lasher v. Medical Press Co., 3 Pa. Super. Ct. 571, 40 Wkly. Notes Cas. 19, organization of corporation after confession of judgment by a limited company and sale of its property thereunder.

Tenn.—Bristol Bank, etc., Co. v.

Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228, the fact that a corporation name was almost identical with a prior partnership name was not conclusive of a device to defraud partnership creditors by incorporating.

Tex.—Sayers v. Texas Land, etc., Co., 78 Tex. 244, 14 S. W. 578, the members of a firm having formed a corporation, and transferred to it all the property of the firm, each receiving stock in proportion to his interest, the transfer is not voluntary and fraudulent in law as against the creditors of the firm.

Wis.—Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114, the mere fact that the debts of a partnership, where partners organized a corporation and transferred the property and business to it for stock, were not provided for was not sufficient to impeach the *bona fides* of the transaction.

28. Fisher v. Campbell, 101 Fed. 156, 41 C. C. A. 256; Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098; Gardner v. Haines (S. D.), 104 N. W. 244; Troy v. Morse, 22 Wash. 280, 60 Pac. 648.

wise negligently allowed it to pass into the hands of others, and thus diminished or defeated his creditors' chances of securing payment of their claims.²⁹

§ 18. **Payment of debt before it is due.**—The statute against fraudulent conveyances, agreements, etc., does not apply to the case of a payment of a debt before it is due, made by the debtor to the creditor, in order to prevent the creditors of the latter from attaching the debt by trustee process.³⁰

§ 19. **Cancellation or release of debt or claim.**—The cancellation or release, by a debtor, of a debt or claim, without consideration or with intent to hinder, delay, or defraud his creditors, is a gift and is fraudulent as to creditors, contrary to the common law, whereby the property must have been such as could have been taken on execution.³¹ This rule prevails in all jurisdictions where under the statute choses in action are subject to the claims of creditors.³²

§ 20. **Rescission of contracts and neglect or failure to take conveyance.**—If a contract for the sale of land is entered into

29. *Johns v. Jordan*, 59 Kan. 771, 51 Pac. 889; *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914, conveyance made by debtor while under the influence of morphine. See also *Fraud* directed against debtor, chap. II, § 26, *infra*.

30. *Chamberlin v. Pillsbury*, 35 Vt. 16.

31. *Ind.*—*Johnson v. Jones*, 79 Ind. 141, a surrender of notes and mortgage.

Mass.—*Martin v. Root*, 17 Mass. 222, discharge of promissory note given in payment for certain property.

Miss.—*Wright v. Petrie, Sm. & M.* Ch. 282, voluntary release of securities by a corporation to its debtor; but where it appears that such re-

lease was made on a settlement of conflicting claims, although more is allowed by the corporation than is strictly just, it is not a fraud, unless the allowance appears to have been a device to injure others, or is grossly extravagant or wasteful, so as to amount to fraud.

N. H.—*Everett v. Read*, 3 N. H. 55, cancellation of note.

Can.—*Upper Canada Bank v. Shickluna*, 10 Grant Ch. (U. C.) 157.

Eng.—*Sibthorp v. Moxom*, 3 Atk. 580, 26 Eng. Reprint, 1134, 1 Ves. 49, 27 Eng. Reprint 883, cancellation of debt by will.

See Rights or choses in action, chap. IV, § 7, *infra*.

32. See chap. IV, § 7, *infra*.

and thereafter said contract is rescinded by the parties either in writing or by parol, if the rescission of the contract was prompted by a motive to benefit the vendee, or injure his creditors, it would be a fraud upon the creditors, and would not affect them, and they might proceed against the land for the satisfaction of their claims. Otherwise, if it was made to save the vendor.³³ An agreement by one entitled to a conveyance that the grantor shall remain in possession and shall not convey, in order to cover the land from the grantee's creditors, amounts to a conveyance to defraud creditors under the statute against fraudulent conveyances.³⁴ But where land is conveyed in consideration that the grantee support the grantor for life, a reconveyance by the grantee at the request of the grantor, the grantee having become indebted, a proper allowance being made for the support already furnished, is not fraudulent in law as to the grantee's creditors, though the land is then conveyed to the wife of the first grantee under a similar agreement.³⁵ It is not a fraud on creditors for the debtor to surrender the contract for the purchase of his homestead to the vendor, who thereupon leases the homestead to the debtor's wife for the debtor's benefit, though the debtor thereby intended to defraud his creditors.³⁶ So a debtor may, without fraud as to his creditors, surrender or transfer an oral bargain for the purchase of an unexpired lease under which he has not entered into possession, since he has no interest therein which can be taken in execution.³⁷ For a debtor to rescind the contract of sale of personal property and take the property back in settlement of the purchase money note is not a fraud on another creditor of the debtor.³⁸

§ 21. Conducting business in the name of another.—One

33. *Maloney v. Bewley*, 10 Heisk. (Tenn.) 642; *Fleming v. Martin*, 2 Head. (Tenn.) 43.

34. *Pennington v. Clifton*, 11 Ind. 162, and the creditor entitled to take the land on execution may settle the title himself or it may be settled by a purchaser from him at the levy and sale.

35. *R. P. Gustin Co. v. Arm*, 107 Mich. 231, 65 N. W. 112.

36. *Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889.

37. *Miller v. Specht*, 11 Pa. St. 449.

38. *Baker v. Drake* (Ala.), 41 So. 845, sale of a horse.

cannot, by doing business in the name of another, defraud his creditors.³⁹ Where an insolvent or failing debtor, for the purpose of placing his property beyond the reach of his creditors, conducts business in the name of his wife, child, or other third person, but the business is carried on or managed by him alone and is in fact his own, the transaction is fraudulent as to creditors, and the property used or accumulated in such business and the profits of the business are liable for and may be subjected to his debts.⁴⁰ But if a debtor carry on a business in the name and upon the credit of another, neither the property used nor that acquired in the business belongs to the debtor or can be reached by his creditors, and if allowed to so carry on a business for his sole benefit, only the property acquired by him in the business could be reached by his creditors, and not the property which the debtor was allowed to use.⁴¹ One may allow the use of his name and capital to another to carry on a business, giving the whole profits to the latter for his labor and attention, without any

39. *Fass v. Rice*, 30 La. Ann. 1278.

40. *Ark.*—*Nickle v. Emerson Mercantile, etc., Co.*, 13 S. W. 78.

Ill.—*Robinson v. Brems*, 90 Ill. 351; *Moran v. Lilley*, 10 Ill. App. 103.

Iowa.—*Hamill v. Augustine*, 81 Iowa, 302, 46 N. W. 1113; *Hamilton v. Lightner*, 53 Iowa, 470, 5 N. W. 603, where accumulated property had been conveyed to the wife.

La.—*Oppenheim v. Loovis*, 9 La. Ann. 261, a simulated partnership, entered into by a debtor to protect his property, will not prevent a creditor from seizing the partnership stock to the amount pretended to have been contributed.

N. H.—*Levy v. Woodcock*, 63 N. H. 413.

N. J.—*National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13, where a

husband, acting under a power of attorney from his wife, who had no separate property, formed a copartnership in the name of his wife with another and conducted a hotel business.

Pa.—*Cadbury v. Brown*, 5 Phila. 43, where a failing debtor took his children into partnership without other consideration than services to be rendered by them in the business, the arrangement is fraudulent as to creditors by limiting their remedy by execution sale to a disposal of the debtor's interest in the firm, under which the purchaser would get nothing but a suit in equity for an accounting.

Wis.—*Ansorge v. Barth*, 88 Wis. 553, 60 N. W. 1055, 43 Am. St. Rep. 928.

41. *Smith v. Van Olinda*, 48 N. Y. 169.

injury to the creditors of the latter, and such an agreement is not fraudulent as to the creditors of the latter.⁴²

§ 22. **Keeping mortgage in force after payment.**—If a mortgage is in fact paid, but, instead of being discharged, is fraudulently assigned with intent to defraud creditors, it is not a valid lien, and those who have received a grant of property from the mortgagor's assignee in bankruptcy, subject to valid incumbrances, are entitled to have the mortgage declared paid, and the fraudulent assignment adjudged void.⁴³

§ 23. **Keeping judgment open after payment.**—A judgment will not avail against creditors where the proofs show that it was fraudulently kept open after it had been in fact paid; nor will a sale by the sheriff under such a judgment give a good title to a purchaser who was cognizant of, and a party to, the fraud.⁴⁴

§ 24. **Keeping certificate of execution sale in force.**—Where a judgment debtor whose land has been sold upon execution advances money to a third person to purchase an assignment of the sheriff's certificate of sale, and thus keep the certificate in force, subsequent creditors cannot object to an assignment so procured.⁴⁵

§ 25. **Antedated note.**—A note bearing interest, which the payee antedates so as to secure to himself money not justly due to him from his insolvent debtor, is within the terms of the statute against fraudulent conveyances.⁴⁶ But where one has given an extension, trusting to the debtor's representations of solvency, and, finds them false, to take measures to put himself in the same position as if there had been no otherwise binding extension, as

42. *Smith v. Van Olinda*, *supra*; *Albert v. Lindau*, 46 Md. 334.

43. *McMasters v. Campbell*, 41 Mich. 513, 2 N. W. 836.

44. *Booth v. Moret*, 1 Brev. (S. C.) 216.

45. *Rankin v. Arndt*, 44 Barb. (N. Y.) 251.

46. *McKentry v. Gladwin*, 10 Cal. 227.

by obtaining and attaching on an antedated note, is not constructive fraud against other creditors.⁴⁷ Where a conveyance of lands has been made, and before it can be recorded defendant attaches the land to secure a note signed by the grantor on the day following the execution of the conveyance, but which was antedated so as to create a present debt, such antedating was a fraud upon the grantee, and he will not be disturbed under the conveyance by virtue of such attachment.⁴⁸

§ 26. **Fraud directed against debtor.**—Fraud which is directed against the debtor, and not against his creditors, is not within the statutes as to fraudulent conveyances, and does not render a transfer or conveyance by the debtor vulnerable to attack by creditors.⁴⁹ The statutes confine their redress to fraud aimed against creditors, and the fraud which will authorize a creditor to impeach a transfer or conveyance by the debtor must be fraud against the creditor.⁵⁰ That the execution of a mortgage or other transfer of property in favor of a creditor was induced by fraud, or by fraud amounting to duress, will not avoid it in favor of other creditors of the mortgagor or transferor. The debtor only

47. *Brewster v. Bours*, 8 Cal. 501.

48. *Briggs v. French*, Fed. Cas. No. 1,871, 2 Sumn. (U. S.) 251.

49. *Ala.*—*Meyrovitz v. Glaser*, 132 Ala. 103, 31 So. 360; *Savage v. Johnson*, 125 Ala. 673, 28 So. 547; *Henry v. Murphy*, 54 Ala. 246.

Iowa.—*Sprague v. Benson*, 101 Iowa, 678, 70 N. W. 731, payment by debtor of ten per cent. interest on a valid debt to his wife under an oral agreement under which she could only enforce six per cent. under the statute.

Kan.—*Johns v. Jordan*, 59 Kan. 771, 51 Pac. 889, where the mortgagee, who became the purchaser, deceived the court in the foreclosure suit, alleging a balance due him when he had taken possession of suf-

ficient personal property to satisfy the entire claim.

Mo.—*Colbern v. Robinson*, 80 Mo. 541.

N. J.—*Garretson v. Kane*, 27 N. J. L. 208.

Wyo.—*Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857.

50. *Ind.*—*McAlpine v. Sweetzer*, 76 Ind. 78, a mere over-reaching of the debtor in the litigation wherein a creditor obtains judgment is not a fraud against other creditors which will authorize them to impeach the judgment obtained. There must be collusion.

Mich.—*Lewis v. Rice*, 61 Mich. 97, 27 N. W. 867.

Pa.—*In re Dougherty*, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326.

can take advantage of such a wrong. And the intention on the part of the creditor in taking such a mortgage or transfer to defraud other creditors of the debtor is not sufficient to avoid it, if the mortgagor or transferrer did not have a like intent in executing the mortgage or transfer.⁵¹

51. *Parker v. Roberts*, 116 Mo. 657, *v. Ellis*, 63 Mo. App. 17; *Eaton v. 22 S. W.* 914; *Marion Distilling Co. Perry*, 29 Mo. 96.

CHAPTER III.

THE EFFECT OF FRAUDULENT CONVEYANCE.

- Section 1. The effect of fraudulent conveyance in general.
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Section 1. The effect of fraudulent conveyance in general.—The effect of a fraudulent conveyance of property, under the statutes of 13 and 27 Elizabeth and under most of the statutes in the United States which are based on the English statutes, is to render the conveyance, while the fraudulent grantee holds the title, absolutely void and a nullity, as against existing and subsequent creditors and subsequent *bona fide* purchasers, both in equity and at law, and they have the same rights against the property embraced in the conveyance as though it had never been made, and the creditor may pursue his process for satisfaction as though the title were unembarrassed by the fraudulent deed.¹ Many of the cases, however,

1. N. Y.—Smith v. Reid, 134 N. Y. 568; 31 N. E. 1082; Bergen v. Carman, 79 N. Y. 146; Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324. 26 How. Pr. 75, 31 N. Y. 140.

U. S.—Thompson v. Baker, 141 U. S. 648, 12 Sup. Ct. 89, 35 L. Ed. 889; Beadle v. Beadle, 40 Fed. 315, 2 McCrary, 586; Lenox v. Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251.

Ala.—Nelson v. Warren, 93 Ala. 408, 8 So. 413; Henry v. Murphy, 54 Ala. 246; High v. Neims, 14 Ala. 350,

48 Am. Dec. 103; Carville v. Stout, 10 Ala. 796.

Ark.—Norton v. McNutt, 55 Ark. 59, 17 S. W. 362; Hershy v. Latham, 42 Ark. 305.

Cal.—Nixon v. Goodwin (App. 1906), 85 Pac. 169; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286.

Conn.—Price v. Heubler, 63 Conn. 374, 28 Atl. 524; Owen v. Dixon, 17 Conn. 492; Starr v. Tracy, 2 Root,

hold that a conveyance fraudulent as to creditors is not absolutely void, but is voidable only, and may be affirmed or avoided by them

528; *Pruden v. Leavensworth*, 2 Root, 129.

D. C.—*Hayes v. Johnson*, 6 D. C. 174.

Ga.—*Gormerly v. Chapman*, 51 Ga. 421; *Feagan v. Cureton*, 19 Ga. 404.

Ill.—*Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771; *McKinney v. Farmers' Nat. Bank*, 104 Ill. 180; *Gould v. Steinburg*, 84 Ill. 170; *Ward v. Enders*, 29 Ill. 519; *Getzler v. Saroni*, 18 Ill. 511.

Ind.—*Stevens v. Works*, 81 Ind. 445.

Iowa.—*Brainard v. Van Kuran*, 22 Iowa, 261.

Ky.—*Scott v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363; *Worland v. Outten*, 3 Dana, 477; *Snapp v. Orr*, 4 Ky. L. Rep. 355.

La.—*Vickers v. Block*, 31 La. Ann. 672; *Mora v. Avery*, 212 La. Ann. 417; *Southern Bank v. Wood*, 14 La. Ann. 554, 74 Am. Dec. 446; *Emswiler v. Burham*, 6 La. Ann. 710; *Maxwell v. Mallard*, 5 La. Ann. 702; *Hughes v. Winfrey*, 5 La. Ann. 668; *Meeker v. Hays*, 18 La. 19; *Price v. Bradford*, 4 La. 35; *Kimble v. Kimble*, 1 Mart. N. S. 633.

Me.—*Wyman v. Fox*, 59 Me. 100; *Brown v. Snell*, 46 Me. 490; *Frost v. Goddard*, 25 Me. 414.

Md.—*Cooke v. Cooke*, 43 Md. 522; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755.

Mass.—*Sherman v. Davis*, 137 Mass. 132; *Edwards v. Mitchell*, 1 Gray, 241.

Mich.—*Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; *Pierce v. Hill*,

35 Mich. 194, 24 Am. Rep. 541; *Trask v. Green*, 9 Mich. 358.

Minn.—*Jackson v. Holbrook*, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; *Campbell v. Jones*, 25 Minn. 155.

Miss.—*Thomason v. Neeley*, 50 Miss. 310.

Mo.—*Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308; *Ryland v. Callison*, 54 Mo. 513; *Potter v. Stevens*, 40 Mo. 229; *Kinealy v. Macklin*, 2 Mo. App. 241.

N. J.—*Mulford v. Peterson*, 35 N. J. L. 127.

N. C.—*Flynn v. Williams*, 29 N. C. 32; *Burgin v. Burgin*, 23 N. C. 160; *Henderson v. Hoke*, 21 N. C. 119; *Hoke v. Henderson*, 14 N. C. 12; *West v. Dubberly*, 4 N. C. 478.

Ohio.—*Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95.

Pa.—*Janney v. Howard*, 150 Pa. St. 339, 24 Atl. 740; *Stewart v. Coder*, 11 Pa. St. 90; *Hays v. Heidelberg*, 9 Pa. St. 203; *Kimmel v. McRight*, 2 Pa. St. 38; *McKee v. Gilchrist*, 3 Watts, 230; *Patrick v. Smith*, 2 Pa. Super. Ct. 113.

S. C.—*Paris v. Du Pre*, 17 S. C. 282; *Jones v. Crawford*, 1 McMull. 373; *Lowry v. Pinson*, 2 Bailey, 324, 23 Am. Dec. 140; *Abrahams v. Cole*, 5 Rich. Eq. 335.

Tenn.—*Jacobi v. Schloss*, 7 Coldw. 385.

Tex.—*Lynn v. Le Gierse*, 48 Tex. 138.

Va.—*Wilson v. Buchanan*, 7 Gratt. 334.

Eng.—*Twyne's Case*, 3 Coke, 80a, 1 Smith Lead. Cas. L

See also Remedies, chap. XV, *infra*.

as they see fit.² A conveyance made to hinder, delay, or defraud creditors is only voidable, it is held, so far as to enable creditors who are prejudiced by it to enforce their demands against the grantor,³ and will only be regarded as invalid at the instance of creditors proceeding in the mode prescribed by law to subject the property involved to their debts.⁴ When a conveyance is said to be void against creditors the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts.⁵ A fraudulent transfer of property, if executed, passes the title, and the transferee has a good title until the same is impeached by a creditor in an action brought for that purpose.⁶ The judgment creditor may, but he is not bound to, file a creditors' bill to set aside the conveyance,⁷ or he may sell the land under execution upon his judgment, and the purchaser may impeach the conveyance in an action at law to recover possession, or if he gain possession defend

2. Ark.—Doster v. National Bank, 67 Ark. 325, 55 S. W. 137, 77 Am. St. Rep. 116, 48 L. R. A. 339.

Ga.—Moore v. Mobley, 123 Ga. 424, 51 S. E. 351.

Mass.—Oriental Bank v. Haskins, 44 Mass. 332, 37 Am. Dec. 140.

Minn.—Hathaway v. Brown, 22 Minn. 214.

N. H.—Hill v. Pine River Bank, 45 N. H. 300, it is good until avoided by creditors; they cannot ignore it.

N. C.—Boyd v. Turpin, 94 N. C. 137, 55 Am. Rep. 597, though void as to a creditor who is pursuing legal process to reach the property, it is valid as against inactive creditors when collaterally drawn in question.

Ohio.—Brown v. Webb, 20 Ohio, 389, 3 Ohio St. 246.

Pa.—Appeal of Byrod, 31 Pa. St. 241.

S. C.—Kid v. Mitchell, 1 Nott & M 334, 9 Am. Dec. 702.

Wash. — Preston-Parton Milling Co. v. Horton, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

3. Collinson v. Jackson, 14 Fed. 305, 8 Sawy. 357.

4. In re Estes, 5 Fed. 60, it is only voidable at the election of the creditor; Parrott v. Crawford (Ind. T. 1904), 82 S. W. 688; Webb v. Brown, 3 Ohio St. 246; Rutherford v. Carr (Tex. Civ. App. 1905), 84 S. W. 659; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

5. Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480.

6. Gibson v. National Park Bank, 98 N. Y. 97; Harding v. Elliott, 12 Misc. Rep. (N. Y.) 521, 33 N. Y. Supp. 1095.

7. Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082; Bergen v. Carman, 79 N. Y. 146; Erickson v. Quinn, 15 Abb. Pr. N. S. (N. Y.) 168.

the title thus acquired against the fraudulent grantee or those claiming under him.⁸ If the creditor condones the fraud and takes no steps to avoid the conveyance, it stands forever as a divestiture of the title of the debtor.⁹ But a transfer of property made to defraud creditors, although thus void or voidable as to creditors and purchasers, is good *inter partes* and valid and binding as between the parties and their heirs and representatives, and the fraudulent grantee may convey a good title to a *bona fide* purchaser.¹⁰ A conveyance fraudulent as to one creditor

8. *Smith v. Reid*, *supra*; *Bergen v. Carman*, *supra*; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

9. *Parrott v. Crawford* (Ind. T. 1904), 82 S. W. 688. See *Purging conveyance by matter ex post facto*, chap. III, § 7, *infra*.

10. N. Y.—*Smith v. Reid*, *supra*; *Moore v. Livingston*, 14 How. Pr. 1; *Jackson v. Cadwell*, 1 Cow. 622; *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252.

U. S.—*Lenox v. Notrebe*, 15 Fed. Cas. No. 8,246c, Hempst. 251.

Ala.—*Nelson v. Warren*, 93 Ala. 408, 8 So. 413.

Ark.—*Norton v. McNutt*, 55 Ark. 59, 17 S. W. 362; *King v. Clay*, 34 Ark. 291.

Cal.—*Brown v. Cline*, 109 Cal. 156, 41 Pac. 862.

Conn.—*Bouton v. Beers*, 78 Conn. 414, 62 Atl. 619; *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56.

Ga.—*Fouche v. Brower*, 74 Ga. 251; *Anderson v. Brown*, 72 Ga. 713.

Ill.—*Harmon v. Harmon*, 63 Ill. 512.

Ind.—*Henry v. Stevens*, 108 Ind. 281, 9 N. E. 356; *Anderson v. Etter*, 102 Ind. 115, 26 N. E. 218; *Etter v. Anderson*, 84 Ind. 333.

Iowa.—*Mellen v. Ames*, 39 Iowa, 283.

Ky.—*Jones v. Hill*, 9 Bush. 692; *Anderson v. Bradford*, 5 J. J. Marsh, 69.

La.—*Keane v. Goldsmith*, 14 La. Ann. 349.

Me.—*Hatch v. Bates*, 54 Me. 136; *Thompson v. Moore*, 36 Me. 47; *Woodman v. Bodfish*, 25 Me. 317.

Md.—*Atkinson v. Phillips*, 1 Md. Ch. 507.

Mass.—*Stillings v. Turner*, 153 Mass. 534, 27 N. E. 671; *Edwards v. Mitchell*, 1 Gray, 239; *Perry v. Hayward*, 12 Cush. 344.

Mich.—*Wheeler v. Wallace*, 53 Mich. 364, 19 N. W. 33.

Minn.—*Piper v. Johnston*, 12 Minn. 60; *Lemay v. Bibeau*, 2 Minn. 291.

Miss.—*Whitney v. Freeland*, 26 Minn. 481.

Mo.—*McLaughlin v. McLaughlin*, 16 Mo. 242.

Neb.—*Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

N. J.—*Evans v. Herring*, 27 N. J. L. 243.

N. C.—*Powell v. Inman*, 53 N. C. 436, 82 Am. Dec. 426.

Ohio.—*Douglass v. Dunlap*, 10 Ohio, 162.

Pa.—*Janney v. Howard*, 150 Pa. St. 339, 24 Atl. 740; *Bonesteel v. Sullivan*, 104 Pa. St. 9.

is void as to all creditors.¹¹ Where a debtor pays the purchase money of land and takes the conveyance to a third person, the rule that a fraudulent conveyance is absolutely void and that the property can be seized under execution against the grantor is generally held not to apply, and such property is not the subject of levy and sale under execution by his creditors, even though the transaction was fraudulent and intended to protect the land from the claims of creditors, since the statute of Elizabeth and similar statutes in the United States apply only to conveyances by the debtor.¹² But, under the statutes of some of the states, the rule is held to apply even in such cases and such property may be seized and sold in execution on the creditors' judgments.¹³

R. I.—Hudson v. White, 17 R. I. 519, 23 Atl. 57.

S. C.—Swanzy v. Hunt, 2 Nott & M. 211; Kid v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tenn.—Bayless v. Elcan, 1 Coldw. 96; Williams v. Lowe, 4 Humph. 62.

Tex.—Wilson v. Trawick, 10 Tex. 428; Texarkana Nat. Bank v. Hall (Civ. App. 1895), 30 S. W. 73.

Wis.—Norton v. Kearney, 10 Wis. 443; Schettler v. Brunette, 7 Wis. 197. See Rights and liabilities of parties, chap. XIV, *infra*.

11. Hoke v. Henderson, 14 N. C. 12. See also Intent to defraud one creditor, chap. XIII, § 2, *infra*. But see Blair v. Brown, 116 N. C. 631, 21 S. E. 434, a deed of assignment is not necessarily fraudulent and void as to all the creditors of the assignor because fraudulent as to one of them; Solomon v. Wright (Tex. Civ. App.), 28 S. W. 414, fraud in part of the debts secured by a deed of trust, participated in by the trustee and the grantor, does not invalidate the instrument as to an honest and valid debt of an innocent holder.

12. *N. Y.*—Brewster v. Power, 10 Paige, 562.

Mass.—Hamilton v. Cone, 99 Mass. 478; Howe v. Bishop, 44 Mass. 26.

Mich.—Maynard v. Hoskins, 9 Mich. 485; Trask v. Greene, 9 Mich. 358.

Miss.—Ferguson v. Bobo, 54 Miss. 121; Carlisle v. Tindall, 49 Miss. 229.

N. J.—Haggerty v. Nixon, 26 N. J. Eq. 42.

N. C.—Everett v. Raby, 104 N. C. 479, 10 S. E. 526, 17 Am. St. Rep. 685; Gentry v. Harper, 55 N. C. 177; Gowing v. Rich, 23 N. C. 553.

S. C.—Bauskett v. Holsonback, 2 Rich. L. 624.

Tenn.—Smith v. Hinson, 51 Tenn. 250.

Vt.—Buck v. Gilson, 37 Vt. 653.

13. *Ind.*—Tevis v. Doe, 3 Ind. 129.

Mass.—Clark v. Chamberlain, 95 Mass. 257.

Mo.—Dunnica v. Coy, 28 Mo. 525, 75 Am. Dec. 133; Herrington v. Herrington, 27 Mo. 560; Dunnica v. Coy, 24 Mo. 167, 69 Am. Dec. 420; Eddy v. Baldwin, 23 Mo. 588; Rankin v. Harper, 23 Mo. 579.

§ 2. Transactions fraudulent in part.—Where a conveyance is actually fraudulent in part and the fraud is participated in or known to the grantee, it is fraudulent *in toto* and void as to the whole of the property conveyed by it, as to the creditors of the party conveying, and cannot stand to any extent as security or indemnity.¹⁴ But where two distinct parcels of land are con-

Pa.—Appeal of Winch, 61 Pa. St. 424.

14. *N. Y.*—Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928; Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Dewey v. Moyer, 72 N. Y. 70; Spies v. Boyd, 1 E. D. Smith, 445; Johnson v. Phillips, 2 N. Y. Supp. 432. transfers and mortgages given partly for valid debts, but including fictitious liabilities, are invalid *in toto* and cannot stand as security even for the actual indebtedness; Marks v. Reynolds, 12 Abb. Pr. 403; Austin v. Bell, 20 Johns. 442, 11 Am. Dec. 297; Hyslop v. Clarke, 14 Johns. 458; Goodrich v. Downs, 6 Hill, 438; Wakeman v. Grover, 4 Paige, 23; Mackie v. Cairns, 5 Cow. 547, 15 Am. Dec. 477, an assignment for the benefit of creditors, bad in part as against the provision of a statute, is void *in toto*; Boyd v. Dunlap, 1 Johns. Ch. 478.

Ala.—Tatum v. Hunter, 14 Ala. 557; Tickner v. Wiswall, 9 Ala. 305.

Ill.—Fabian v. Traeger, 117 Ill. App. 176, *aff'd* 215 Ill. 220, 74 N. E. 131, a purchase which is colorable and fraudulent in part is, as to other creditors of the seller, void as to the whole of the property conveyed; Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371, 104 Am. St. Rep. 238, conveyance of land fraudulently conveyed at a sum much less than its value set aside in its entirety and not sustained as to a portion equal to the

actual value paid; Oakford v. Dunlap, 63 Ill. App. 498, where part of property was taken in payment of debts and part for cash or valuable consideration paid or agreed to be paid.

Ind.—Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701, where an insolvent corporation executed a mortgage in favor of creditors who accepted the same, and the mortgage was invalid as to preferences therein granted to stockholders over unsecured creditors, the mortgage will be deemed inseverable and invalid as a whole.

Kan.—Miami County Nat. Bank v. Barkalow, 53 Kan. 68, 35 Pac. 796, the inclusion in a mortgage from a failing firm of a debt due from one not a member of the firm vitiates the mortgage as to creditors of the firm; Wallach v. Wylie, 28 Kan. 138, chattel mortgage to secure a sum which was partly *bona fide* indebtedness and partly fraudulent is void *in toto*; Harley v. Adsit, 3 Kan. App. 122, 42 Pac. 836.

Md.—Albert v. Wynn, 7 Gill, 446, although no fraud is intended a conveyance good in part and in part void as contrary to statute is void *in toto*.

Mass.—Lynde v. McGregor, 95 Mass. 172, 90 Am. Dec. 188.

Mich.—Clarke v. Lee, 78 Mich. 221, 44 N. W. 260; Pierson v. Man-

veyed, the conveyance of one being *bona fide* and that of the other fraudulent as to creditors, it may be avoided by creditors as to the latter, and be valid as to the former.¹⁵ And where a conveyance is only constructively fraudulent in part it is not thereby necessarily rendered invalid, in the absence of actual fraud.¹⁶ As

ning, 2 Mich. 446; Kirby v. Ingersoll, Harr. 172.

Miss.—Burke v. Murphy, 27 Miss. 167.

Mo.—Boland v. Ross, 120 Mo. 208, 25 S. W. 524, where part of indebtedness for which a mortgage is given is fraudulent as to creditors it will avoid the entire mortgage; Hanna v. Finley, 33 Mo. App. 645, where a creditor took more of a debtor's assets than were reasonably necessary to pay his claim, agreeing to cancel the surplus for a time and then account for it, the entire transaction was void; State v. Excelsior Distilling Co., 20 Mo. App. 21; McNichols v. Richter, 13 Mo. App. 515.

Neb.—Switz v. Bruce, 16 Neb. 463, 20 N. W. 639.

N. C.—Johnson v. Murchison, 60 N. C. 286; Stove v. Marshall, 52 N. C. 300; Hafner v. Irwin, 23 N. C. 490, where part of the consideration is feigned or fraudulent, the whole deed is void.

Pa.—Gates v. Johnston, 3 Pa. St. 52; McClurg v. Lecky, 3 Penr. & W. 83, 23 Am. Dec. 64, assignment for benefit of creditors; Thomas v. Jenks, 5 Rawle, 221, assignment of partnership property, containing provision for release of partners from individual indebtedness, void where partners had separate property; Whiting v. Johnson, 11 Serg. & R. 328, 14 Am. Dec. 633, bond taken fraudulently for more than real debt.

Tenn.—Simpson v. Mitchell, 8

Yerg. 417; Sommerville v. Horton, 4 Yerg. 541, 26 Am. Dec. 242; Young v. Pate, 4 Yerg. 164; Darwin v. Handley, 3 Yerg. 502.

Tex.—Brasher v. Jamison, 75 Tex. 139, 12 S. W. 809, part of consideration for deed unreal or fictitious; Lambeth v. McClinton, 65 Tex. 108, where the transaction which results in the transfer of goods is single and indivisible, it must stand or fall as a whole.

Va.—Garland v. Rives, 4 Rand. 282, 15 Am. Dec. 756.

W. Va.—Kanawha Valley Bank v. Wilson, 25 W. Va. 242; Livesay v. Beard, 22 W. Va. 585.

Can.—Cameron v. Perrin, 14 Ont. App. 565.

Fraudulent judgment.—A judgment fraudulent in part must stand or fall as a whole and is void, not to the extent of the fraud, but absolutely. Simons v. Goldbach, 56 Hun (N. Y.) 204, 9 N. Y. Supp. 359; Marks v. Reynolds, 12 Abb. Pr. (N. Y.) 403; Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548; Taaffe v. Josephson, 7 Cal. 352; Gates v. Johnston, 3 Pa. St. 52.

An execution sale, partly colorable, is void. Floyd v. Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130. See Execution and other judicial sales, chap. II, § 14, *supra*.

15. Chase v. Walker, 26 Me. 555.

16. Rogers v. Munnerlyn, 36 Fla. 591, 18 So. 669, a mortgage covering merchandise and real estate, which is constructively void as to the goods,

a general rule where a part of the consideration for a conveyance or transfer is fictitious or fraudulent the conveyance is void *in toto*, though the rest of the consideration be valid.¹⁷ But a conveyance or transfer of property to two or more creditors or purchasers may be valid as to one and fraudulent and void as to the other, particularly where one creditor or purchaser participated in or knew of the fraudulent purpose and the other was innocent thereof; the fact that the transfer was as to one of them in fraud of creditors will not necessarily render it fraudulent as to the other.¹⁸

because of the mortgagee's permission to sell them in the usual course of trade without accounting for the proceeds, is not thereby rendered invalid as to the real estate.

See Reimbursement, indemnity and subrogation, consideration and expenditures, chap. XIV, §§ 40, 41, *infra*.

17. Marks v. Reynolds, 12 Abb. Prac. (N. Y.) 403, but a confession of judgment may be sustained as to some of the amounts acknowledged, though held void as to others for indefiniteness; Tatum v. Hunter, 14 Ala. 557; Gates v. Johnston, 3 Pa. St. 52, a judgment fraudulent in part is void in the whole as to creditors. See Partial invalidity or illegality of consideration, chap. VIII, § 30, *infra*.

18. N. Y.—Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834, a transfer of property by an insolvent to two of his creditors, in payment of a distinct indebtedness owing to each, gives each of them an undivided one-half interest in the property, and may be sustained as to one of them, although the transfer as to the other is invalid as in fraud of creditors.

U. S.—Tefft v. Stern, 73 Fed. 591, 21 C. C. A. 67, certain creditors se-

cured by a mortgage, having knowledge of a fraudulent purpose, and others not having such knowledge; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552, separate conveyances of different property for separate considerations.

Ala.—Robert Graves Co. v. McDade, 108 Ala. 420, 19 So. 86, where but one knew of the fraud.

Mass.—Prince v. Shepard, 26 Mass. 176, where one of the assignees was innocent of the fraud.

Mich.—Kock v. Bostwick, 113 Mich. 302, 71 N. W. 473, the fraudulent character of a chattel mortgage given by a corporation as against its creditors does not invalidate a paramount mortgage on the same property to a *bona fide* creditor, although the two mortgages were executed on the same day, and were authorized at the same meeting of the board of directors.

N. J.—Farrel v. Colwell, 30 N. J. L. 123, where one of the partners who made the purchase did so in fraud of creditors and the other was a *bona fide* vendee.

Tenn.—Troustine v. Lask, 4 Baxt. 162, trust deed may be valid as to some of its beneficiaries, and void as

§ 3. Fraud in one or more of several transactions.—Where several conveyances of property are made by a debtor to one grantee at or about the same time or at different times, the fact that one of them is fraudulent and void as to creditors, or is otherwise invalid, will not render the others void, if they are separate and distinct transactions;¹⁹ but, if the several acts form

to others who concur in a fraudulent purpose of the grantor.

Tex.—*Sonnenheil v. Texas Guaranty, etc., Co.*, 10 Tex. Civ. App. 274, 30 S. W. 945; *Willis & Bro. v. Murphy* (Civ. App.), 28 S. W. 362; *Kraus v. Haas*, 6 Tex. Civ. App. 665, 25 S. W. 1025, trust deeds held void as to beneficiaries who participated in the fraud and valid as to others who had no knowledge thereof.

W. Va.—*Livesay v. Beard*, 22 W. Va. 585, a fraudulent deed to several grantees jointly will stand as security for those who had no knowledge of the fraud.

Contra.—*Minn.* — *Thompson v. Johnson*, 55 Minn. 515, 57 N. W. 223, where a preference is given by transferring property to a creditor, and to others who pay part of the agreed price in money, the transfer will be invalid as to the latter if they knew its purpose was to give a preference to the creditor.

19. *N. Y.*—*Maass v. Falk*, 146 N. Y. 34, 40 N. E. 504; *Friedman v. Rose*, 83 Hun, 542, 31 N. Y. Supp. 1040; *Kinghorn v. Wright*, 45 N. Y. Super. Ct. 615; *Nicholson v. Leavitt*, 4 Sandf. 252; *Wise v. Rider*, 34 N. Y. Supp. 782; *Books v. Wilson*, 53 Hun, 173, 6 N. Y. Supp. 116, where the grantee in a conveyance made to defraud the grantor's creditors, at the request of the grantor, mortgages the property conveyed to secure a debt owing by the grantor to the

mortgagee, the latter has the same rights as if the mortgage had been made before the fraudulent conveyance.

U. S.—*Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Hunter v. Marlboro*, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168, where a trust made to defraud creditors is executed by the trustee, who conveys the property to a third person to secure a loan to the *cestui que trust*, whose rights the grantee distinctly recognizes, the trust created by such conveyance between the grantee and the *cestui que trust* is enforceable.

Ala.—*Nelms v. Steiner*, 113 Ala. 562, 22 So. 435, where goods were sold to plaintiff and afterwards the seller gave plaintiff mortgages which were wholly disconnected from the sale, fraud as to creditors in the mortgages would not affect the sale, if that in itself was free from fraud.

Cal.—*Gray v. Galpin*, 98 Cal. 633, 33 Pac. 725.

Conn.—*Lucas v. Birdsey*, 41 Conn. 357.

Ill.—*Rutt v. Shuler*, 49 Ill. App. 655.

Ind.—*Keen v. Preston*, 24 Ind. 395, a sale of chattels to a creditor in part satisfaction of a debt, and a transfer of collateral security to him for the balance of the debt, although made in pursuance of the same agreement, are separate transactions, so that a fraudulent transfer of the col-

parts of one transaction, they will be considered together in a proceeding to set them aside, and, if one of them is fraudulent, all of them will be void as to creditors.²⁰ And where several conveyances of property are made by a debtor to several different grantees with a common purpose on the part of the grantor and the grantees to defraud creditors of the grantor, the several con-

laterals would not contaminate the sale, if the latter was *bona fide*.

Iowa.—Muir v. Miller, 103 Iowa, 127, 72 N. W. 409, the fact that one note in controversy was obtained by the garnishee, wife of defendant, from her husband without consideration and in fraud of creditors, raised no presumption against the validity of the transfer of another note between the same parties.

Kan.—Bowling v. Armourdale Bank, 57 Kan. 174, 45 Pac. 584.

Ky.—Ford v. Williams, 42 Ky. 550.

Me.—Matthews v. Buck, 43 Me. 265.

Mass.—Boyd v. Brown, 34 Mass. 453.

Mich.—Koek v. Bostwick, 113 Mich. 302, 71 N. W. 473.

Mo.—St. Louis Mut. L. Ins. Co. v. Cravens, 69 Mo. 72.

Neb.—Bierbower v. Polk, 17 Neb. 268, 22 N. W. 698.

N. H.—Pettee v. Dustin, 58 N. H. 309.

N. J.—Stillman v. Stillman, 21 N. J. Eq. 126.

N. C.—Winborne v. Lassiter, 89 N. C. 1.

Ohio.—O'Connell v. Cruise, 1 Handy, 164, 12 Ohio Dec. (Reprint) 81.

Tenn.—Robinson v. Baugh (Ch. App.), 61 S. W. 98.

Wis.—Kickbush v. Corwith, 108 Wis. 634, 85 N. W. 148; Hoey v. Pier-

ron, 67 Wis. 262, 30 N. W. 692, the fact that several chattel mortgages are executed at the same time does not make them all of one transaction, so that the invalidity of one for lack of sufficient consideration attaches to all.

20. *U. S.*—Burdick v. Gill, 7 Fed. 668, 2 McCrary, 486.

Cal.—Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Colo.—Anders v. Barton, 3 Colo. App. 324, 33 Pac. 142.

Iowa.—Snouffer v. Kinley, 96 Iowa, 102, 64 N. W. 770.

Mass.—Lynde v. McGregor, 95 Mass. 182, 90 Am. Dec. 188.

Mich.—Hubbard v. Taylor, 5 Mich. 155.

Mo.—State v. Excelsior Distilling Co., 20 Mo. App. 21.

Neb.—Switz v. Bruce, 16 Neb. 463, 20 N. W. 639.

S. C.—Bates v. Cobb, 29 S. C. 395, 7 S. E. 743, 13 Am. St. Rep. 742; McSween v. McCown, 23 S. C. 342; Hipp v. Sawyer, 1 Rich. Eq. Cas. 410, conveyance by husband of personal property in trust for his wife and at the same time conveyance of real estate to the same trustee for the latter's own use.

Tex.—Baylor v. Brown, 3 Tex. Civ. App. 177, 21 S. W. 73, conveyance by debtor of his entire stock of goods, fixtures, etc., followed on the same day by a transfer of all his notes and outstanding accounts.

veyances, whether made at different times or at or about the same time, and although made to different persons, will be considered as component parts of one scheme or transaction, with the same intent pervading the whole, and if a fraudulent intent be shown as to any one of the conveyances, it will vitiate and invalidate all.²¹ Where, however, the conveyances are separate and independent transactions, and one is not tainted with the same fraudulent intent as the others, it will not be rendered fraudulent and invalidated by the fact that the others are fraudulent and void as to creditors.²² Where a debtor made a conveyance fraudulent as to his creditors, and took from the grantee a mortgage to secure trust funds in the grantor's hands, it was held that equity, while setting aside the conveyance, would recognize the validity of the mortgage.²³

§ 4. Effect of prior fraudulent transaction on subsequent valid transfer.—A conveyance of property by a debtor which

21. *N. Y.*—*Illinois Watch Co. v. Payne*, 11 *N. Y. Supp.* 408, *aff'd* 132 *N. Y.* 597, 30 *N. E.* 1151, fraudulent confessions of judgments and assignment.

Ala.—*Russell v. Davis*, 133 *Ala.* 647, 31 *So.* 514, 91 *Am. St. Rep.* 56.

Mo.—*Benne v. Schnecko*, 100 *Mo.* 250, 13 *S. W.* 82.

S. C.—*Younger v. Massey*, 39 *S. C.* 115, 17 *S. E.* 711; *Hipp v. Sawyer*, 1 *Rich. Eq. Cas.* 410.

Tenn.—*Summers v. Howland*, 2 *Baxt.* 407.

Tex.—*Hughes v. Roper*, 42 *Tex.* 116, a deed from a father to some of his children to whom he was indebted, and from them to others, as to whom no indebtedness existed, may be considered as one transaction, and as a deed of gift to the extent of the second transfer.

W. Va.—*Livesay v. Beard*, 22 *W. Va.* 585.

22. *N. Y.*—*Illinois Watch Co. v. Payne*, 11 *N. Y. Supp.* 408, *aff'd* 132 *N. Y.* 597, 30 *N. E.* 1151.

U. S.—*Crawford v. Neal*, 144 *U. S.* 585, 12 *Sup. Ct.* 759, 36 *L. Ed.* 552, *aff'g* 36 *Fed.* 29.

Ill.—*Rutt v. Shuler*, 49 *Ill. App.* 655.

Ky.—*Ford v. Williams*, 3 *B. Mon.* 550.

Mich.—*Sheldon v. Mann*, 85 *Mich.* 265, 48 *N. W.* 573.

Neb.—*Bierbower v. Polk*, 17 *Neb.* 268, 22 *N. W.* 698.

N. J.—*Stillman v. Stillman*, 21 *N. J. Eq.* 126.

Tenn.—*Summers v. Howland*, 2 *Baxt.* 407.

Wis.—*Hoey v. Pierron*, 67 *Wis.* 262, 30 *N. W.* 692.

23. *First Nat. Bank v. Cummins*, 39 *N. J. Eq.* 577.

was not fraudulent as to creditors at the time it was made cannot be rendered fraudulent by prior acts or conduct of the parties, or by previous separate and distinct fraudulent transactions, made at or about the same time or at a different time.²⁴ But prior fraudulent transactions may not only be a badge of fraudulent intent, but may in themselves be sufficient evidence that a conveyance was in fact fraudulent.²⁵ The fact that a mortgage on a stock of goods is void, as to other creditors of the mortgagor, because it authorizes the mortgagor to sell the property and use the proceeds in his business, does not affect the right of the mortgagor to give another mortgage to secure the debt, free from such infirmity.²⁶

§ 5. Effect of subsequent fraudulent transaction on prior valid transfer.—A conveyance of property by a debtor valid in its inception and made in good faith and without intent to hinder, delay, or defraud creditors is not invalidated by the subsequent acts or conduct of the parties, or by a subsequent and independent transaction made at or about the same time or at a different time which is fraudulent as to creditors.²⁷ But subsequent fraudulent

24. *N. Y.*—*Wise v. Rider*, 88 Hun, 620, 34 N. Y. Supp. 782.

U. S.—*Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

Ala.—*Thornton v. Cook*, 97 Ala. 630, 12 So. 403.

Conn.—*Lucas v. Birdsey*, 41 Conn. 357; *Cook v. Swan*, 5 Conn. 140.

Me.—*Matthews v. Buck*, 43 Me. 265.

Mich.—*Krolik v. Root*, 63 Mich. 562, 30 N. W. 339.

Mo.—*St. Louis Mut. L. Ins. Co. v. Cravens*, 69 Mo. 72.

N. H.—*Pettee v. Dustin*, 58 N. H. 309.

N. C.—*White v. White*, 35 N. C. 265; *King v. Cantrel*, 26 N. C. 251.

Ohio.—*O'Connell v. Cruise*, 1 Handy, 164, 12 Ohio Dec. (Reprint), 81.

25. *Mo.*—*Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82.

S. C.—*McSween v. McCown*, 23 S. C. 342.

W. Va.—*Livesay v. Beard*, 22 W. Va. 585.

26. *Wise v. Rider*, 88 Hun, 620, 34 N. Y. Supp. 782.

27. *N. Y.*—*Maass v. Falk*, 146 N. Y. 34, 40 N. E. 504, the fact that, on the day after the transfer of property to secure certain creditors, the debtor made a general assignment, does not of itself raise a presumption that the transfer was fraudulent; *Friedman v. Rose*, 83 Hun, 542, 31 N. Y. Supp. 1040, the fact that a bill of sale taken as additional security to a chattel mortgage is void because it was not filed, and there was no

transactions may not only furnish proof of fraudulent intent, but may in themselves be sufficient evidence that a conveyance was

change of possession, does not render the chattel mortgage also void; *Kinghorn v. Wright*, 45 N. Y. Super. Ct. 615, although the proceeds of the prior conveyance may be connected with the consideration of the subsequent transfer; *Nicholson v. Leavitt*, 4 Sandf. 252; *Weller v. Wayland*, 17 Johns. 102, a bill of sale valid at the time of execution is not rendered invalid by allowing part of the goods included therein to remain in possession of the vendor.

U. S.—*Schreyer v. Scott*, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955; *Judson v. Courier Co.*, 15 Fed. 541, a voluntary conveyance from a parent to his children by way of settlement, when otherwise valid as to creditors, is not rendered invalid by subsequent contributions by the parent of money to pay off incumbrances and improve the property.

Ala.—*Buford v. Shannon*, 95 Ala. 205, 10 So. 263; *Warren v. Jones*, 68 Ala. 449; *Stokes v. Jones*, 18 Ala. 734.

Ark.—*Cornish v. Dews*, 18 Ark. 172; *Hempstead v. Johnson*, 18 Ark. 123, 65 Am. Dec. 458.

Cal.—*Gray v. Galpin*, 98 Cal. 633, 33 Pac. 725.

Conn.—*Clark v. Johnson*, 5 Day, 373.

Ga.—*Scott v. Winship*, 20 Ga. 429, the fact that a judgment debtor fraudulently conceals property supposed to be subject to his debts will not render a prior conveyance fraudulent as to creditors, unless the grantee was privy to the act.

Ill.—*Rutt v. Shuler*, 49 Ill. App. 655.

Ind.—*Rose v. Colter*, 76 Ind. 590, subsequent insolvency of vendor; *Ray v. Simons*, 76 Ind. 150.

Kan.—*Bowling v. Armourdale Bank*, 57 Kan. 174, 45 Pac. 584, the taking of a second and separate mortgage by a creditor, even if invalid, does not necessarily defeat a first valid mortgage.

Ky.—*United States Bank v. Huth*, 4 B. Mon. 423.

Mass.—*Hatch v. Smith*, 5 Mass. 42.

Mich.—*Sheldon v. Mann*, 85 Mich. 265, 48 N. W. 573; *Paige v. Kendrick*, 10 Mich. 300.

Mo.—*Krueger v. Vorhauer*, 164 Mo. 156, 63 S. W. 1098, schemes to defraud existing and subsequent creditors entered into by a debtor, after making a deed of trust, cannot affect the validity of such deed; *Page v. Dixon*, 59 Mo. 43; *Gates v. Labeaume*, 19 Mo. 17, an assignment for the benefit of creditors, valid in its creation, is not vitiated by subsequent fraudulent or illegal acts of the assignor.

Neb.—*Bierbower v. Polk*, 17 Neb. 268, 22 N. W. 698.

N. J.—*Owen v. Arvis*, 26 N. J. L. 22; *Stillman v. Stillman*, 21 N. J. Eq. 126.

N. C.—*Winborne v. Lassiter*, 89 N. C. 1.

Tex.—*Cleveland v. Empire Mills*, 6 Tex. Civ. App. 479, 25 S. W. 1055, subsequent conduct of debtor and trustee in conveyance for benefit of preferred creditors not acquiesced in by the beneficiaries.

Vt.—*Bracket v. Waite*, 4 Vt. 389.

Va.—*Clayton v. Anthony*, 6 Rand. 285, a deed of trust, if fairly executed to secure a just debt, cannot be im-

in fact fraudulent.²⁸ Fraud will be presumed where a voluntary conveyance to a wife is followed within a short time by the fraudulent disposition of the remaining estate of the grantor.²⁹ A conveyance which is constructively fraudulent, but is made to cure the defects in a prior valid conveyance, will not, however, affect the validity of such prior conveyance.³⁰ A conveyance not fraudulent at first may become so afterwards by being concealed, or not pursued, by means of which creditors have been induced to give credit,³¹ or by being subsequently made use of for the purpose of covering up the grantor's interest in the property or otherwise defrauding his creditors.³² And when put to a fraudulent use as to subsequent creditors, the fraud may be carried back to the date of the conveyance, so as to invalidate it as to such creditors.³³ If a judgment be valid in its inception, it is not rendered invalid because execution is taken out thereon with a view to hinder and delay creditors, and has such effect.³⁴ The fact that, after completion of an absolute and valid sale and delivery of property, promises are made to the seller to give him the proceeds of the sale of the property in excess of a certain amount, does not operate retroactively on the sale, and avoid it in favor of a creditor of the seller.³⁵ A voluntary conveyance, if

peached on the ground of fraud for any matter *ex post facto*.

Wash.—*Sanders v. Main*, 12 Wash. 665, 42 Pac. 122.

W. Va.—*Harden v. Wagner*, 22 W. Va. 356.

Eng.—*Stone v. Griebham*, 2 Bulst. 217.

Equity may compel execution of the trust immediately, where a conveyance valid in its inception, made for the security of creditors, becomes by subsequent events oppressive and injurious to other creditors. *Pope v. Wilson*, 7 Ala. 690.

28. U. S.—*Burdick v. Gill*, 7 Fed. 668, 2 McCrary, 486.

Ala.—*Constantine v. Twelves*, 29 Ala. 607.

Mass.—*Lynde v. McGregor*, 95 Mass. 182, 90 Am. Dec. 188.

29. *Burdick v. Gill*, 7 Fed. 668, 2 McCrary, 486.

30. *Warren v. Jones*, 68 Ala. 449.

31. *Lamont v. Regan*, 96 Ill. App. 359.

32. *Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308; *Bauer Grocery Co. v. Smith*, 1 Mo. App. Repr. 439.

33. *Carter v. Grimshaw*, 49 N. H. 100.

34. *Wilder v. Winne*, 6 Cow. (N. Y.) 284.

35. *Klemm v. Bishop*, 56 Ill. App. 613.

valid at the time of its execution, because of the absence of fraudulent intent and of the grantor's retaining sufficient property to meet all his debts, is not rendered fraudulent as against subsequent creditors or purchasers by subsequent embarrassments of the grantor.³⁶

§ 6. **Conveyance must be fraudulent when made.**—A conveyance is not necessarily void because its effect is to hinder and delay creditors of the grantor, but such must be its object, and it must be a fraudulent contrivance for that purpose; and the party to be benefited by the conveyance must be privy to the fraudulent design.³⁷ The intention of the party making the conveyance gives it its character and whether or not the fraudulent intention existed is to be ascertained from the circumstances existing at the time, and not from subsequent events having no actual connection with the transaction.³⁸ The legality of a conveyance is determined at the moment of its execution, though the disposition of the proceeds of the sale may be material to show the legality or illegality of the intention of the parties.³⁹ But a conveyance which when drawn was intended by the grantor to put his property out of the reach of his creditors will not be set aside as fraudulent if, at the time of its delivery and acceptance by the grantee, the sole object of both the parties to the instrument was that it should be held by the grantee as a security for a debt due from the grantor to a third person.⁴⁰

§ 7. **Purging conveyance of fraud by matter ex post facto.**—It is a well settled principle that a conveyance in fraud of creditors, and voidable by a purchaser, may be purged of the fraud and become good by matter *ex post facto*.⁴¹ Where there is a

36. *Brackett v. Waite*, 4 Vt. 389.

37. *Hempstead v. Johnston*, 18 Ark. 123.

38. *Ray v. Simons*, 76 Ind. 150.

39. *Owen v. Orvis*, 26 N. J. L. 22.

40. *Stewart v. Mannington Exch. Bank*, 55 N. J. Eq. 795, 38 Atl. 952.

41. *U. S.*—*Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329, where a debtor in order to secure a creditor, assigned to a trustee, meantime retaining the goods for sale, which assignment was void for irregularities under the laws of

conveyance fraudulent as to creditors, the parties may subsequently rescind it, and if the illegal agreement be annulled or abrogated and the fraudulent purpose wholly abandoned, and another conveyance or contract be made in good faith and free from fraud, before the rights of creditors or purchasers have intervened and become fixed or they have taken any action to disaffirm it or to obtain any lien, or before liens have attached upon the property, or in the case of a conveyance which is fraudulent because it is voluntary and without consideration, if a consideration is afterwards paid, this may purge the fraud and give validity to the transaction.⁴² But where a conveyance expressly

the State where made, a subsequent deed by him, in which the trustee joins, in favor of the creditor, and a bill of sale of the property by him to the creditor, in the absence of fraud, were valid; *Sumner v. Hicks*, 2 Black, 532, 17 L. Ed. 355, if the debtor makes an assignment which is void, and afterwards, but before any creditor has acquired a lien, makes another which is free from objection, the latter assignment is valid.

Miss.—*Agricultural Bank v. Dorsey*, 1 Freem. Ch. 338, as if it be transferred in payment of a debt of the grantor, or, if a portion only of the property be conveyed and applied by the fraudulent grantee, the conveyance will be valid to that extent.

N. H.—*Smyth v. Carlisle*, 17 N. H. 417.

42. *N. Y.*—*Hurd v. New York, etc., Steam Laundry Co.*, 52 App. Div. 467, 65 N. Y. Supp. 125, *rev'd* 29 Misc. 183, 60 N. Y. Supp. 813, where a corporation of which R. was president transferred a portion of its property to another corporation, receiving stock in payment, the fact that the stock was issued to the wife of R. would not invalidate the previous sale, if that were valid, if

such act was done mistakenly, and subsequently corrected by a reconveyance by her to the corporation, and no one was prejudiced by the act; *Hardt v. Deutsch*, 30 App. Div. 589, 52 N. Y. Supp. 335, where a creditor holds a chattel mortgage upon the property of his debtor, which is voidable by other creditors on account of an illegal verbal agreement, but, before their rights have become fixed or they have taken any action to disaffirm it or obtain any lien the illegal agreement is annulled, and the debtor voluntarily transfers possession of the property to the mortgagee as security for the indebtedness, this latter transfer is not invalidated by the originally voidable character of the mortgage; *Bowdish v. Page*, 153 N. Y. 108, 47 N. E. 45; *Wise v. Rider*, 34 N. Y. Supp. 782. the fact that a mortgage on a stock of goods is void, as to other creditors of the mortgagor, because it authorizes the mortgagor to sell the property and use the proceeds in his business, does not affect the right of the mortgagor to give another mortgage to secure the debt, free from such infirmity; *Brooks v. Wilson*, 53 Hun, 173, 6 N. Y. Supp.

and intentionally fraudulent has been made, no subsequent act of the grantor nor subsequent payment or advance by the grantee will purge it of fraud and give validity to the transaction. If any part of the original purpose is fraudulent, the whole may be avoided, though made upon sufficient consideration. In like manner, if any part of the fraudulent purpose remain, it vitiates the whole.⁴³ No rights can be lost or acquired by a fraudulent trans-

116, where the grantee in a conveyance made to defraud the grantor's creditors, at the request of the grantor, mortgages the property conveyed to secure a debt owing by the grantor to the mortgagee, the latter has the same rights as if the mortgage had been made before the fraudulent conveyance.

Ala.—*Borland v. Mayo*, 8 Ala. 104.

Ind.—*Langsdale v. Woollen*, 99 Ind. 575, a conveyance originally made on a secret trust in fraud of creditors may become valid by so modifying the terms of the trust as to give to creditors their rights in the proceeds of the sale to be made by the trustee.

La.—*Roussel v. Dukeylus Syndics*, 4 Mart. 240.

Me.—*Matthews v. Buck*, 43 Me. 265.

Mass.—*Lynde v. McGregor*, 95 Mass. 182, 90 Am. Dec. 188; *Oriental Bank v. Haskins*, 3 Metc. 332, 37 Am. Dec. 140; *Boyd v. Brown*, 34 Mass. 453; *Richards v. Allen*, 25 Mass. 405, an absolute conveyance intended as security for future advances, if it could be avoided by creditors, is rendered valid by a bond, given after the advances have been made, to recover upon the payment of the money so advanced.

N. C.—*White v. White*, 35 N. C. 265; *King v. Cantrel*, 26 N. C. 251.

The fraudulency of a conveyance of attached real property from a judgment debtor to his wife pending an attachment suit does not affect the validity of his title derived under a purchase at an execution sale in pursuance of the attachment and a subsequent foreclosure sale under a mortgage executed by her. *Dimock v. Ridgway*, 169 Mass. 526, 48 N. E. 338.

Delivery of possession after sale or mortgage, see chap. XII, §§ 3, 27, *infra*.

43. *N. Y.*—*Bailey v. Burton*, 8 Wend. 339.

Ill.—*Head v. Harding*, 166 Ill. 353, 46 N. E. 890.

Ky.—*Poague v. Boyce*, 6 J. J. Marsh. 70.

Md.—*Moore v. Blondheim*, 19 Md. 172.

Mass.—*Lynde v. McGregor*, 95 Mass. 182, 90 Am. Dec. 188.

Mo.—*Gentry v. Field*, 143 Mo. 399, 45 S. W. 286; *Martin v. Rice*, 24 Mo. 581; *Lawrence v. Barker*, 82 Mo. App. 125, where no abandonment of a previous mortgage was shown, so as to purge the transaction from fraud and entitle plaintiff to the rights of a *bona fide* purchaser under a bill of sale executed on the same day the property was attached by the mortgagor's creditors.

Pa.—*Bunn v. Ahl*, 29 Pa. St. 387, 72 Am. Dec. 639.

fer of property which is retransferred before the fraudulent purpose is effected, so that the conditions existing prior to such transfer are restored.⁴⁴ Where property is fraudulently conveyed by a debtor to avoid attachment, and is subsequently transferred by the holder to a creditor of such debtor, and at his request, such creditor will hold the property by a good title.⁴⁵ Where the object of a grantor in making a conveyance is to hinder or delay his creditors, the instrument is not purged of the fraud because he also had some other purpose in view in making it.⁴⁶

§ 8. **Conveyance validated by assent or affirmation by creditors.**—A conveyance which is fraudulent as to creditors may be rendered valid by the subsequent assent thereto or affirmation thereof, express or implied, of the creditors entitled to avoid the same.⁴⁷ Express assent may be by a formal authenticated act recognizing the title of the grantee.⁴⁸ The assent or affirmation of a creditor may be implied from his having dealt with the parties to the conveyance as if it were valid,⁴⁹ or from his accepting a benefit under it, with full knowledge of all the vitiating cir-

S. C.—McSween v. McCown, 23 S. C. 342.

A subsequent purchase of the land at an execution sale by the fraudulent purchaser at a trustee's sale does not validate his title, as against a *bona fide* judgment creditor of the grantor. Woodard v. Mastin, 106 Mo. 324, 17 S. W. 308.

44. *N. Y.*—Cramer v. Blood, 48 N. Y. 684, *aff'g* 57 Barb. 155, 671, property conveyed, returned or paid out before recovery of judgment.

Ind.—Second Nat. Bank v. Brady, 96 Ind. 498, reconveyance pursuant to agreement.

Iowa.—Davidson v. Dwyer, 62 Iowa, 332, 17 N. W. 575.

Kan.—McCord, etc., Mercantile Co. v. Burson, 38 Kan. 278, 16 Pac. 664,

where a fraudulent sale was revoked by consent.

Me.—Matthews v. Buck, 43 Me. 265, contract rescinded before the rights of creditors or purchasers intervened.

N. J.—Wheeler v. Kirkland, 23 N. J. Eq. 13, where voluntary gifts were returned.

Tenn.—Stanton v. Shaw, 3 Baxt. 12, land reconveyed by third party.

45. Boyd v. Brown, 34 Mass. 453.

46. Hansen v. Dennison, 7 Ill. App. 73; Reed v. Noxon, 48 Ill. 323.

47. Hatchett v. Blanton, 72 Ala. 423; Zuver v. Clark, 104 Pa. St. 222; Geisse v. Beall, 3 Wis. 367.

48. Theriot v. Michel, 12 La. Ann. 107.

49. Rennie v. Bank of Chilli-cothe, 8 Ohio, 530.

cumstances;⁵⁰ or from the receipt by him of the purchase money or a part thereof from the grantor or the grantee;⁵¹ or from the receipt by him of the proceeds from the sale of the property or a dividend under an assignment or deed of trust;⁵² or from his proceeding against the grantee for the purchase price.⁵³ The receiver of the judgment debtor who has elected to take a personal judgment against one to whom the debtor had assigned property cannot have the assignments set aside on the ground that they were fraudulent as to creditors.⁵⁴

§ 9. Prejudice to rights of creditors.—In order that a conveyance, transfer, or transaction may be attacked as being fraudulent and void as against creditors, prejudice to the rights of

50. *Gutzwiller v. Lackman*, 23 Mo. 168.

51. *Ala.*—*Butler v. O'Brien*, 5 Ala. 316, note given for purchase of goods received by creditor from grantor.

Ark.—*Bowden v. Spellman*, 59 Ark. 251, 27 S. W. 602, promissory notes given by the purchaser and assigned by the debtor to the creditor; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547, creditor elected to take from the grantee the agreed price.

Ind.—*Kitts v. Willson*, 140 Ind. 604, 39 N. E. 313, judgment paid by grantee.

Iowa.—*Heaton v. Ainley* (1898), 74 N. W. 766, title of fraudulent grantee cannot be attacked by a creditor who has taken a mortgage from him.

Minn.—*Lemay v. Bibeau*, 2 Minn. 291, judgment creditor received, on account of his judgment, a portion of the purchase price of certain lands conveyed.

Tenn.—*Cunningham v. Campbell*, 3 Tenn. Ch. 708.

Tex.—*Larkin v. Wilsford* (Civ. App.), 29 S. W. 540.

Wis.—*Shawano County Bank v. Koeppen*, 78 Wis. 533, 47 N. W. 723, where creditor's claim was secured in part by a mortgage on the property.

Can.—*Wood v. Reesor*, 22 Ont. App. 57.

52. *Fla.*—*Simon v. Levy*, 36 Fla. 438, 18 So. 777, where creditor went into partnership with the fraudulent vendee, to carry on business with the goods transferred; *Furness v. Ewing*, 2 Pa. St. 479.

53. *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447, where creditors proceeded against the purchasers for the moneys due upon notes taken in payment.

54. *Fitts v. Beardsley*, 8 N. Y. Supp. 567.

See also Estoppel — Knowledge, assent or affirmance, chap. V, §§ 18, 19, *infra*; Receipt of benefit under conveyance, chap. V, § 21, *infra*; Right of grantee to pay creditor and retain property, chap. XIV, § 32, *infra*; Election of remedies, chap. XV, § 30, *infra*.

creditors must result therefrom, even where there is an actual fraudulent intent.⁵⁵ A mere intent to defraud not resulting in injury will not render a conveyance fraudulent; there must be something done in pursuance of the intention which operates prejudicially on the rights of creditors.⁵⁶ If one of two joint judgment debtors conveys property to the other, such conveyance is not prejudicial to the rights of the judgment creditor, and cannot be made the basis of a creditors' bill to set aside the conveyance as fraudulent.⁵⁷ A conveyance made with intent to defraud creditors is not fraudulent if there were no creditors; and it is for the law to determine whether there were creditors or

55. *N. Y.*—Shand v. Hanley, 71 N. Y. 319.

Ala.—Danner Land, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184; Pickett v. Pipkin, 64 Ala. 520.

Conn.—Barney v. Cutler, 1 Root, 489.

Ga.—Rutherford v. Chapman, 59 Ga. 177; Brown v. Spivey, 53 Ga. 155.

Ill.—Phillips v. North, 77 Ill. 243.

Iowa.—Hook v. Mowre, 17 Iowa, 195.

Ky.—Hanby v. Logan, 62 Ky. 242; Shiveley v. Jones, 45 Ky. 274.

La.—Willis v. Scott, 33 La. Ann. 1026; Payne v. Kemp, 33 La. Ann. 818; Levi v. Morgan, 33 La. Ann. 532; Meche v. Lalanie, 30 La. Ann. 1136; Gillis v. Dansby, 26 La. Ann. 711; Lafleur v. Hardy, 11 Rob. 493; Lott v. Gray, 6 Rob. 152; Hubbard v. Hobson, 14 La. 453; Kenney v. Dow, 10 Mart. 577, 13 Am. Dec. 342.

Me.—Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687.

Mich.—Bodine v. Simmons, 38 Mich. 682.

Miss.—Simmons v. Ingram, 60 Miss. 886; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70; Winn

v. Barnett, 31 Miss. 653; Everett v. Winn, 1 Sm. & M. Ch. 67.

N. H.—Blake v. Williams, 36 N. H. 39; Bean v. Brackett, 34 N. H. 102.

Pa.—Appeal of Haak, 100 Pa. St. 59; Miner v. Warner, 2 Grant, 448; Boyle v. Thomas, 1 Chest. Co. Rep. 117.

S. C.—Kid v. Mitchell, 1 Nott. & M. 334, 9 Am. Dec. 702; King v. Clarke, 2 Hill Eq. 611.

S. D.—Gardner v. Haines (1905), 104 N. W. 244.

Tex.—Kerr v. Hutchins, 46 Tex. 384, 36 Tex. 452.

W. Va.—Zell Guano Co. v. Heatherly, 45 W. Va. 311, 31 S. E. 932.

Wis.—Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

See also Tests as to fraudulent conveyance, chap. I, § 3, *supra*. Persons who may attack conveyance, chap. V, *infra*.

56. Rice v. Ferry, 61 Me. 145; Bancroft v. Blizzard, 13 Ohio, 30. See also cases cited in the last preceding note. See also Accomplishment of purpose, chap. XIII, § 3, *infra*.

57. McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

not.⁵⁸ The transfer by a debtor of exempt property or property of little or no value, not being prejudicial to the rights of creditors, cannot be set aside as fraudulent and the property subjected by creditors.⁵⁹

§ 10. **Conflict of laws; what law governs.**—The general rule is that the validity of a conveyance or transfer of real property by a debtor, as by any other person, is governed by and to be determined in accordance with the law of the state or place where such real property is situated.⁶⁰ The general rule as to a transfer of personal property by a debtor wheresoever situated, is that the validity thereof is governed by and to be determined in accordance with the law of the debtor's domicile, or of the place where the transfer is made; but this rule always yields when the law and policy of the state where the property is actually located have provided a different rule of transfer from that of the state where the debtor lives, or of the place where the transfer is made.⁶¹ Judicial comity does not require the courts of one state

58. *Day v. Lown*, 51 Iowa, 364, 1 N. W. 786.

59. See Exempt Property, chap. IV, § 41, *infra*; Property of little or no value, chap. IV, § 4, *infra*.

60. *U. S.*—*Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Nichol v. Levy*, 5 Wall. 433, 18 L. Ed. 596.

Ala.—*Danner v. Brewer*, 69 Ala. 191.

D. C.—*Keane v. Chamberlain*, 14 App. Cas. 84.

Kan.—*Watson v. Holden*, 58 Kan. 657, 50 Pac. 883.

Ky.—*Brown v. Early*, 2 Duv. 369.

Mass.—*Chipman v. Peabody*, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437.

Ohio.—*Brannon v. Brannon*, 2 Disn. 224.

Okla.—*Williams v. Kemper, etc.*,

Dry Goods Co., 4 Okla. 145, 43 Pac. 1148.

61. *N. Y.*—*Keller v. Paine*, 107 N. Y. 83, 13 N. E. 635; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Ockerman v. Cross*, 54 N. Y. 29.

U. S.—*Greene v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599, 7 Wall. 139, 19 L. Ed. 109.

Ala.—*Hardaway v. Semmes*, 38 Ala. 657; *Inge v. Murphy*, 10 Ala. 885.

Cal.—*Forbes v. Scannell*, 13 Cal. 242.

Conn.—*Ward v. Connecticut Pipe Mfg. Co.*, 71 Conn. 345, 41 Atl. 1057, 71 Am. St. Rep. 207, 72 L. R. A. 706; *Ballard v. Winter*, 39 Conn. 179; *Koster v. Merritt*, 32 Conn. 246.

Ind.—*Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258.

Kan.—*Mackey v. Pettijohn*, 6 Kan. App. 57, 49 Pac. 636.

to enforce a transfer of personal property, which, even, if valid under the *lex domicilii*, conflicts with the policy of that state relating to property within its borders, or impairs the rights or remedies of domestic creditors.⁶² A transfer in one state, although valid there, which would be void as to creditors if made in another state, does not confer title to personal property situated in the latter state, that is good as against a resident of that state armed with legal process to collect a debt.⁶³ To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due its own citizens, out of property within its boundaries and pro-

Ky.—Levy v. Kentucky Distilling Co., 9 Ky. L. Rep. 103.

La.—Oliver v. Townes, 2 Mart. N. S. 93.

Md.—Pleasanton v. Johnson, 91 Md. 673, 47 Atl. 1025; Moore v. Land, etc., Co., 82 Md. 288, 33 Atl. 641; Baltimore, etc., R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 288.

Mass.—Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209; Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433.

Minn.—In re Kahn, 55 Minn. 509, 57 N. W. 154; In re Dalpay, 41 Minn. 532, 43 N. W. 564, 16 Am. St. Rep. 729, 6 L. R. A. 108; Lewis v. Bush, 30 Minn. 244, 15 N. W. 113.

Mo.—National Bank of Commerce v. Morris, 21 S. W. 511, 19 L. R. A. 463.

N. H.—Sessions v. Little, 9 N. H. 271.

N. J.—Frazier v. Fredericks, 24 N. J. L. 162.

N. C.—Drewry v. Phillips, 44 N. C. 81.

Okla.—Williams v. Kemper, etc., Dry Goods Co., 4 Okla. 145, 43 Pac. 1148.

Pa.—Townsend v. Maynard, 45 Pa. St. 198.

Tenn.—Lally v. Holland, 1 Swan, 399; Flickey v. Loney, 4 Baxt. 169.

Tex.—Fowler v. Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254.

A transfer of personal property which is invalid by the law of the place where it was made and where the property was situated will not be declared valid in another State. *Watson v. Campbell*, 38 N. Y. 153; *Pyatt v. Powell*, 51 Fed. 551, 2 C. C. A. 367; *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186.

62. *Dearing v. McKinnon Dash, etc., Co.*, 165 N. Y. 78, 87, 58 N. E. 773, 80 Am. St. Rep. 708, *aff'g* 33 App. Div. (N. Y.) 31, 53 N. Y. Supp. 513; *Keller v. Paine*, 107 N. Y. 83, 89, 13 N. E. 635; *Warner v. Jaffray*, 96 N. Y. 248, 255, 48 Am. Rep. 616. But see *Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052, the rule that a foreign assignment will not be upheld as against domestic creditors does not apply to an absolute and *bona fide* sale.

63. *Dearing v. McKinnon Dash, etc., Co.*, *supra*; *Guillander v. Howell*, 35 N. Y. 657.

tected by its law.⁶⁴ If, however, a transfer of personal property is valid in the state where it is made, it will be held valid by the courts of another state, as against non-resident creditors, although the law and policy of that state prescribe otherwise.⁶⁵ A transfer of personal property by a debtor which is legal under the laws of the state where the transfer is actually made and the property is situated passes the title, and the laws of another state, which is the domicile of the debtor, making such a transfer void, cannot divest the title thus legally acquired.⁶⁶ Where a mortgage of personal property made by a corporation organized in one state is made in another state there to be performed and the goods covered thereby are in the latter state, it is not subject to a statute of the former state, forbidding mortgages by corporations so organized, but its validity is determined by the law of the latter state.⁶⁷ Whether a wife acquired ownership of her earnings so as to make them a valid consideration for a conveyance to her from her husband must be determined by the law of the state where they resided when the earnings were made.⁶⁸ Where an insolvent husband removes with his wife from one state to another and after removal makes a conveyance in trust for her, in consideration of property belonging to her which he has used, in determining his liability to her, as against his creditors, the law of each state should govern as to that portion of her property there received and used by him.⁶⁹

64. *Dearing v. McKinnon Dash, etc., Co.*, *supra*; *Greene v. Van Buskirk*, 72 U. S. 307, 312, 18 L. Ed. 599, 74 U. S. 139, 150, 19 L. Ed. 109; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 46 Am. Rep. 433.

65. *Barnett v. Kinney*, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247; *Rhode Island Cent. Bank v. Danforth*, 14 Gray (Mass.), 123; *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450;

Williams v. Kemper, etc., Dry Goods Co., 4 Okla. 145, 43 Pac. 1148.

66. *Mead v. Dayton*, 28 Conn. 33; *In re Queensland Mercantile, etc., Co.* (1891), 1 Ch. 536.

67. *Boehme v. Rall*, 51 N. J. Eq. 541, 26 Atl. 832.

68. *Hinman v. Parkis*, 33 Conn. 188.

69. *Gilkey v. Pollock*, 82 Ala. 503.

CHAPTER IV.

PROPERTY AND RIGHTS TRANSFERRED WHICH CREDITORS MAY REACH.

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Section 1. Property subject to claims of creditors in general.

—It is the general policy of the law that creditors shall have the right to resort to all the property of the debtor not protected by statute.¹ At common law all of a debtor's property, except necessary wearing apparel, might be taken to pay the claims of creditors. So might all rights of action arising from contract, and also judgments recovered for the wrongs of others.² A judgment creditor with the aid of equity may reach any property or interest of his debtor, not exempt from execution, which, with such aid, the debtor might himself reach.³ But to authorize the setting aside of a conveyance as fraudulent as against creditors, it must transfer property of some value out of which the creditor could have realized his claim, or some portion of it, and the transfer must have been made with intent to defraud.⁴ A trans-

1. *Schenck v. Barnes*, 156 N. Y. 316, 41 L. R. A. 395, 50 N. E. 967; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Catchings v. Manlove*, 39 Miss. 655.

2. *Stevenson v. Stevenson*, 34 Hun (N. Y.) 157.

3. *Ala.*—*Sims v. Gaines*, 64 Ala. 392.

Ark.—*Harris v. King*, 16 Ark. 122.

Fla.—*Robinson v. Springfield Co.*, 21 Fla. 203.

Neb.—*Weckerly v. Taylor* (1905), 103 N. W. 1065; *Millard v. Parsell*, 57 Neb. 178, 77 N. W. 390.

Nev.—*White v. Seldon*, 4 Nev. 280.

N. J.—*Haven v. Bliss*, 26 N. J. Eq. 363; *Stratton v. Dialogue*, 16 N. J. Eq. 70.

4. *N. Y.*—*Hoyt v. Godfrey*, 88 N. Y. 669; *Mapes v. Snyder*, 59 N. Y. 450; *Guy v. Craighead*, 21 App. Div. 460, 47 N. Y. Supp. 576; *Spaulding v. Keyes*, 1 Silv. Sup. 203, 5 N. Y. Supp. 227, *aff'd* 125 N. Y. 115, 26 N. E. 15.

U. S.—*Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816.

Ala.—*Dearman v. Dearman*, 5 Ala. 202.

Conn.—*Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23 Atl. 154.

fer by a debtor is not fraudulent as to his creditors which does not withdraw from the creditors any property which was subject to their claims.⁵ A conveyance or transfer of property by a debtor cannot be fraudulent as against creditors, where they have no right, either at law or in equity, to subject the property to the payment of their claims.⁶ The transfer by a debtor, without consideration, of an equitable interest in property not subject to be levied on at law, to hinder and delay his creditors, is not void as to his judgment creditors.⁷ A debt, payment of no part of which can be enforced by reason of the insolvency of the debtor, does not constitute property, within the purview of the statute, the transfer of which is fraudulent as to creditors.⁸ Future earnings of minor children are not assets of the father's estate to which creditors have any right to look, so as to prevent their relinquishment by the father, though insolvent, to the children, if he so wills.⁹ If a conveyance of land be set aside as fraudulent the products of the land may also be reached by

Ga.—Rutherford v. Chapman, 59 Ga. 177.

Ky.—Steeley v. Steeley, 23 Ky. L. Rep. 966, 64 S. W. 642.

La.—Baldwin v. McDonald, 48 La. Ann. 1460, 21 So. 48; Succession of Coyle, 32 La. Ann. 79.

Me.—Pulsifer v. Waterman, 73 Me. 233; Hall v. Sands, 52 Me. 355; Hubbard v. Remick, 10 Me. 140; Wilson v. Ayer, 7 Me. 207.

Minn.—Aultman & Co. v. Pikop, 56 Minn. 531, 58 N. W. 551; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637.

Mo.—Trabue v. Henderson, 180 Mo. 616, 79 S. W. 451; Ault v. Eller, 38 Mo. App. 598.

Or.—Besser v. Joice, 9 Or. 310.

S. C.—Durham Fertilizer Co. v. Hemphill, 45 S. C. 621, 24 S. E. 85; Davidson v. Graves, Riley Eq. 232.

Tenn.—Read v. Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122;

Wagner v. Smith, 81 Tenn. 560; Leslie v. Joyner, 39 Tenn. 514.

Tex.—Monday v. Vance, 11 Tex. Civ. App. 374, 32 S. W. 559.

Can.—Lodor v. Creighton, 9 U. C. C. P. 295; Blakely v. Gould, 24 Ont. App. 153; Mathews v. Feaver, 1 Cox Ch. 278, 1 Rev. Rep. 39, 29 Eng. Reprint, 1165, copyholds not being naturally subject to debts, are not the subject of a conveyance fraudulent as against creditors.

5. Adkins v. Bynum, 109 Ala. 281, 19 So. 400.

6. Stam v. Smith, 183 Mo. 464, 81 S. W. 1217. See also cases in note 4.

7. Planters' Bank v. Henderson, 23 Tenn. 75.

8. Hoyt v. Godfrey, 88 N. Y. 669; Shultz v. Hoagland, 85 N. Y. 464.

9. Merrill v. Hussey, 101 Me. 439, 64 Atl. 819.

creditors,¹⁰ but improvements made pending the action will not be allowed.¹¹ A fraudulent transfer does not in any sense enlarge the rights of creditors, but leaves them to enforce such rights as if no conveyance had been made.¹²

§ 2. **Estates which may be reached.**—Land conveyed to husband and wife jointly and partly paid for by the husband's means, or the husband's portion of an estate by the entirety, may be reached by his creditors to the extent of such payment, although there was no actual fraudulent intent.¹³ A lease of lands owned by a debtor,¹⁴ a contingent reversionary interest,¹⁵ and an estate in expectancy,¹⁶ are within the statute against fraudulent conveyances. Property taken by a debtor in the name of trustees for the debtor's family,¹⁷ or in the name of the husband and wife,¹⁸ is also within the statute. But the statute does not apply to the case of a tenant in tail opening his estate and re-

10. *State v. McBride*, 105 Mo. 265, 15 S. W. 72. See chap. IV, § 25, *infra*.

11. *Grandin v. First Nat. Bank* (Neb. 1904), 98 N. W. 70. See Compensation for improvements, chap. XIV, § 43, *infra*.

12. *U. S.*—*Cox v. Wilder*, 6. Fed. Cas. No. 3,308, 2 Dill. 45; *McFarland v. Goodman*, 16 Fed. Cas. No. 8,789, 6 Biss. 111.

Ky.—*Knevan v. Specker*, 74 Ky. 1.

Miss.—*Dulion v. Harkness*, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 563.

Mo.—*Vogler v. Montgomery*, 54 Mo. 577.

N. C.—*Crummen v. Bennet*, 68 N. C. 494.

Ohio.—*Sears v. Hens*, 14 Ohio St. 298, 84 Am. Dec. 378.

13. *Newlove v. Callaghan*, 86 Mich. 297, 48 N. W. 1096, 24 Am. St. Rep. 123.

14. *Daugherty v. Bogy*, 3 Ind. T. 197, 53 S. W. 542; *Christy v. Courte-*

nay, 26 Beav. 140, 53 Eng. Reprint, 850; *Shears v. Rogers*, 3 B. & Ad. 362, 1 L. J. K. B. 89, 23 E. C. L. 164.

15. *Neale v. Day*, 4 Jur. N. S. 1225, 28 L. J. Ch. 45, 7 Wkly. Rep. 45; *French v. French*, 6 DeG. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint 1166.

16. *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122, a voluntary transfer by a debtor of his expectancy in his living father's estate will not be upheld in equity as against creditors who were such either at the time of the conveyance or at the date of the father's death.

17. *Barton v. Vanheythuysen*, 11 Hare, 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

18. *Glaister v. Hewer*, 8 Ves. Jr. 195, 32 Eng. Reprint, 329, 9 Ves. Jr. 12, 32 Eng. Reprint, 504, 11 Ves. Jr. 377, 32 Eng. Reprint, 1133.

settling it on himself for life with remainder over.¹⁹ Where a deed conveying realty in fee and reserving a life estate is held fraudulent as to creditors, it cannot be upheld as to the reservation of the life estate to the extent of requiring that the land be sold subject to the life interest as an incumbrance.²⁰

§ 3. **Personal property.**—The statute of 13 Elizabeth avoids voluntary conveyances of personal property, as well as land, as against creditors, but not as against subsequent purchasers; and the statute of 27 Elizabeth avoids voluntary conveyances of land only as against subsequent purchasers. The latter statute as well as the former has been often held to be declaratory or affirmative of the common law, although in its terms it applies only to land;²² yet it has been held that it may be regarded as a settled principle that it extends only to conveyances of real estate.²³ A voluntary conveyance of personal property is within the spirit of the statute of 27 Elizabeth and, therefore, void, as against subsequent purchasers, as well as void upon the principles of the common law.²⁴ Most American statutes, which are based upon the English statutes mentioned,²⁵ in terms avoid all voluntary transfers of real or personal property, and a creditor's suit will lie to reach personal property fraudulently transferred.²⁶ The mere omission of the provision embracing "goods, chattels, and things in action" from a statute, declaring void conveyances made to hinder, delay, or defraud creditors, will not be construed as affecting the common law rule which renders a conveyance of goods and chattels, made with such intent, fraudulent and void as to creditors.²⁷ The provisions of the statutes of 13

19. *Clements v. Eccles*, 11 Ir. Eq. 229.

20. *McNally v. White*, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214.

21. *Garrison v. Brice*, 48 N. C. 85.

22. *Footman v. Pendergrass*, 3 Rich. Eq. (S. C.) 33; *Hudnal v. Wilder*, 4 McCord (S. C.), 294, 17 Am. Dec. 744; *Gardner v. Cole*, 21 Iowa, 205; *Gibson v. Love*, 4 Fla. 217.

23. *Sewall v. Glidden*, 1 Ala. 52.

24. *Harper v. Scott*, 12 Ga. 125.

25. See chap. I, §§ 8, 11.

26. *McClosky v. Stewart*, 63 How. Pr. (N. Y.) 137; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593.

27. *Byrnes v. Volz*, 53 Minn. 110, 54 N. W. 942; *Benton v. Snyder*, 22 Minn. 247; *Hicks v. Stone*, 13 Minn.

and 27 Elizabeth relating to fraudulent transfers of property apply to transfers of personal property, notwithstanding the omission from such statutes, as revised, of the words "goods and chattels."²⁸

§ 4. **Property or rights without pecuniary value.**—Although a voluntary conveyance of property has been held to be void as to creditors, irrespective of the value of the property,²⁹ as a rule the gift or voluntary transfer of property of trifling value or of no value at all will not be adjudged by the courts to be a disposition of property with intent to defraud. It is a familiar rule that the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim.³⁰

434; *Blackman v. Wheaton*, 13 Minn. 326.

28. *Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286.

29. *Garrison v. Monaghan*, 33 Pa. St. 232, *overruling Fassit v. Phillips*, 4 Whart. (Pa.) 399; *Rankin v. Gardner* (N. J. Ch.), 34 Atl. 935, the conveyance of only a valueless equity in land held to be fraudulent.

30. *N. Y.*—*Hoyt v. Godfrey*, 88 N. Y. 669, cancellation of worthless debt against an insolvent; *Guy v. Craighead*, 21 App. Div. (N. Y.) 460, 47 N. Y. Supp. 576. *Compare Fitts v. Beardsley*, 55 Hun (N. Y.), 603, 8 N. Y. Supp. 576, *aff'd* 126 N. Y. 645, 27 N. E. 853, although a mortgage is claimed to have been valueless and not enforceable, when the mortgagee testified that he had advanced the full consideration and one to whom he had assigned it has foreclosed it, and its validity was not questioned in the foreclosure proceedings, its validity is sufficiently established to subject the proceeds of the foreclosure to the claims of the mortgagee's creditors on

the ground that the assignment was fraudulent.

Conn.—*Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23 Atl. 154, surrender of life insurance policies of no value as assets.

Iowa.—*Foreman v. Citizens' State Bank*, 128 Iowa, 661, 105 N. W. 163, transfer by a husband to his wife of a calf of trifling value; *McCormick Harvester Mach. Co. v. Pouder*, 123 Iowa, 17, 98 N. W. 303, husband permitting wife to be substituted in his place as one of the tenants under a lease having no pecuniary value at the time, although it afterwards became of value.

Ky.—*Steeley's Creditors v. Steeley*, 23 Ky. L. Rep. 996, 64 S. W. 642, assignment by a debtor to his wife of a life insurance policy that had no vendible value; *Hanby v. Logan*, 1 Duv. (Ky.) 242.

La.—*Baldwin v. McDonald*, 48 La. Ann. 1460, 21 So. 48, transfer by an insolvent debtor of the parts of an incomplete patented machine, of practically no value to any one but the

The conveyance of an equity of redemption, practically valueless because of the property being incumbered to its full value or for more than it is worth, will not be set aside as fraudulent as against creditors, since in such a case the creditors are not injured.³¹ Actual intent to defraud should be clearly established from the value of the property transferred and the surrounding circumstances.³²

patentee, will not be set aside as fraudulent merely because an indebtedness due the transferee is the consideration, if the transfer is not injurious to the creditors.

Me.—French v. Holmes, 67 Me. 186, the gift of property of infinitesimal value or so trifling in value that it would not pay the expenses of a sale on execution, will not be disturbed as fraudulent.

Mass.—Williams v. Robbins, 15 Gray (Mass.), 590.

Minn.—Keith v. Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566, 94 N. W. 677, transfer of equity in land the non-exempt part of which was at the time materially less in value than the vendor's lien; Baldwin v. Rogers, 28 Minn. 544, 11 N. W. 77.

Pa.—In re Gross' Estate, 6 Pa. Co. Ct. 113, 19 Phila. 80, gifts of articles of insignificant intrinsic value, by an insolvent husband to his wife, not at any one time by way of settlement, but at considerable intervals, are not applicable to the payment of the husband's debts.

Wash.—Klosterman v. Vader, 6 Wash. 99, 32 Pac. 1050, assignment of lease of wild land of little value until improved, unless it is shown that the lease is of some value.

W. Va.—Johnson v. Riley, 41 W. Va. 140, 23 S. E. 698, conveyance of property incumbered to its full value.

31. *N. Y.*—Stacy v. Deshaw, 7 Hun (N. Y.), 449.

Ind.—Marmon v. White, 151 Ind. 445, 51 N. E. 930.

Mass.—Williams v. Robbins, 15 Gray (Mass.), 590.

Minn.—Keith v. Albrecht, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566; Aultman & Taylor Co. v. Dalen, 56 Minn. 531, 58 N. W. 551; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637; Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Baldwin v. Rogers, 28 Minn. 544, 11 N. W. 77, though made with intent to put the land beyond their reach. *Compare* Spooner v. Travelers' Ins. Co., 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305, as to debtor's right when other remedy is available.

Mo.—Mittelburgh v. Harrison, 90 Mo. 444, 3 S. W. 203, *aff'd* 11 Mo. App. 136, in the absence of proof of actual fraud.

W. Va.—Cox v. Horner, 43 W. Va. 786, 28 S. E. 780; Johnson v. Riley, 41 W. Va. 140, 23 S. E. 698, property incumbered to its full value may be conveyed by an insolvent in satisfaction of the incumbrances, since it is not a conveyance to the exclusion or prejudice of other creditors.

32. Hoyt v. Godfrey, 88 N. Y. 669; Washington Cent. Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, as to premiums paid

§ 5. **Interest of debtor in property conveyed.**—Statutes providing that gifts, conveyances, etc., of any estate, with intent to delay, hinder, and defraud, shall be void as against creditors, have been held, as a rule, to refer to property owned by the debtor, and not to apply to property to which he had no title or interest, legal or equitable, which was liable to sale on execution, or which his creditors could reach and had a right to subject to the payment of their claims.³³ Such statutes do not apply to

by an insolvent for a moderate amount of insurance upon his life in favor of his wife; *Hopkirk v. Randolph*, 12 Fed. Cas. No. 6,698, 2 Brock. (U. S.) 132; *Emerson v. Bemis*, 69 Ill. 537, reasonable gift or provision for wife or child; *French v. Holmes*, 67 Me. 186; *Partridge v. Gopp*, Ambl. 596, 27 Eng. Reprint, 388, 1 Eden, 163, 28 Eng. Reprint, 647; *Lush v. Wilkinson*, 5 Ves. Jr. 384, 31 Eng. Reprint, 642.

33. N. Y.—*Jackson v. Ham*, 15 Johns. (N. Y.) 261, where a lot was conveyed to the debtor, without consideration, for the purpose of qualifying him to vote, the grantor retaining possession, and was subsequently reconveyed to the grantor while a suit was pending against the debtor for a tort.

Ala.—*Dearman v. Dearman*, 5 Ala. 202, where a father joined with a son in the conveyance of property to another son, which property, before the conveyance was not liable for the debt of the father, the act of the father was not fraudulent as to creditors.

Cal.—*Moore v. Besse*, 43 Cal. 511, where a judgment debtor sold land to which he had acquired a pre-emption right, to defraud a judgment creditor, and the purchaser pre-empted the land and obtained a patent therefor, such creditor cannot

attack the patent for fraud, or the title held by the purchaser, since at the time of the conveyance the debtor had only a personal privilege to take the necessary steps to procure title and had no interest in the land which was liable to sale on execution.

Conn.—*Jarvis v. Prentice*, 19 Conn. 272, conveyance of property held in trust.

Ind.—*Bremmerman v. Jennings*, 101 Ind. 253, to a complaint to set aside an alleged fraudulent deed, an answer stating that the deed was drawn up in the debtor's name as grantee, that it was never delivered, that the grantor intended to give the land to his daughter, the debtor's wife, and that at his request he made another deed conveying the land to her, was held good, if for no other reason than that the deed was never delivered to the husband, and hence he never had any title to the property which his creditors could reach.

Ky.—*Louisville City Nat. Bank v. Woolridge*, 116 Ky. 641, 25 Ky. L. Rep. 869, 76 S. W. 542, it is no fraud as to his creditors for a husband to consent to a wife's testamentary disposition of her personalty.

Md.—*Mishler v. Finch*, 104 Md. 183, 64 Atl. 945, conveyance of property by a debtor and his wife, con-

conveyances of trust property by the trustee to the beneficiaries or to conveyances by one having the bare legal title to one already having the beneficial title or interest in the property.³⁴ A conveyance in fraud of creditors, or a voluntary conveyance, if made to hinder, delay, and defraud creditors, of lands to

veying property conveyed by the debtor to the wife prior to the incurring of his indebtedness.

Mich.—*Petit v. Hubbell*, 105 Mich. 405, 63 N. W. 407, a levy and execution sale may be declared void as a cloud upon the title of the true owner, who at the time of the levy had been promised a conveyance by the debtor, who had without authority, while acting as agent, taken the title in his own name; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792, a transfer of a mortgagee's interest in land is not fraudulent as to creditors.

Miss.—*Citizens' Mut. Ins. Co. v. Foster*, 64 Miss. 288, 1 So. 238, where all the debtor conveyed was the legal title, which could not be subjected to the debts of a firm to which he belonged, while the equitable title was in his wife.

Mo.—*Stam v. Smith*, 180 Mo. 464, 81 S. W. 1217. But see *St. Francis Mill Co. v. Sugg*, 169 Mo. 130, 69 S. W. 359, where in an action by judgment creditors to set aside a fraudulent conveyance by their debtor, they alleged that the land belonged to him at the time, and defendant also asserted that title was in him, and claimed title under such deed, and the court found all the issues in favor of the plaintiff, it was error to dismiss the bill on the ground that he had no title.

N. J.—*Wisner v. Osborne*, 64 N. J. Eq. 614, 55 Atl. 51, where an in-

solvent permitted his infant son to contract for wages to be paid to the son, and stock of a corporation was bought with the wages and stood in the son's name, it was not subject to the claims of the father's creditors.

N. C.—*Runyon v. Leary*, 20 N. C. 373, where the vendor and purchaser contracted for a life estate in certain slaves at a fair price for such interest, with the supposition that the vendor was entitled to no greater interest, and the vendor conveyed all his right, title and interest therein, and it subsequently appeared that the vendor was entitled to an absolute interest in them, worth ten times the value of the life estate, the conveyance was not fraudulent as to creditors.

W. Va.—*Prim v. McIntosh*, 43 W. Va. 790, 28 S. E. 742, a vendor of land, who knows that the purchase price is to be paid from the separate estate of the purchaser's wife, although the legal title is taken by the husband, cannot thereafter attack as fraudulent a conveyance made by the husband to the wife, in an attempt to subject the land to the payment of a debt owed him by the husband for the purchase of a mule, of which debt the wife had no notice.

³⁴ *Smith v. Ellison*, 80 Ark. 447, 97 S. W. 666; *McCormick Harvesting Mach. Co. v. Perkins* (Iowa, 1906), 110 N. W. 156. See Conveyance of property by debtor to equitable owner, chap. 4, § 31, *infra*.

which, at the time of its execution, the grantor had not such an interest as could be subjected by his creditors, either in law or equity, to the payment of his debts, but to which he afterwards acquired title, is void as to creditors and subsequent *bona fide* purchasers. A voluntary fraudulent estoppel is impotent to defeat the just claims of creditors and *bona fide* purchasers.³⁵

§ 6. **Conveyance in another county.**—A judgment rendered is not a lien on lands of the judgment debtor situated in another county, where a transcript of the judgment has not been filed in the county where the land is situated; and it does not constitute a fraud upon the judgment plaintiff for the judgment defendant to convey such land to a third person after the rendition of judgment.³⁶

§ 7. **Rights or choses in action.**—It is held by the courts in many jurisdictions that, in the absence of a statute, the debts, choses in action, and equitable rights of the debtor may be reached in equity when fraudulently transferred, although not subject to execution and sale at common law.³⁷ In other juris-

35. *Stokes v. Jones*, 21 Ala. 731, so held as to a conveyance with covenants of warranty; *Flynn v. Williams*, 20 N. C. 32.

36. *Baker v. Chandler*, 51 Ind. 85, where no fraud in fact was alleged.

37. *N. Y.*—*Hadden v. Spader*, 20 Johns. (N. Y.) 554; *Bayard v. Hoffman*, 4 Johns. Ch. (N. Y.) 450; *McDermutt v. Strong*, 4 Johns. Ch. (N. Y.) 687; *Greenwood v. Brodhead*, 8 Barb. (N. Y.) 593; *Edmeston v. Lyde*, 1 Paige (N. Y.) 637, 19 Am. Dec. 454. See also *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601, 47 N. E. 262; *Knower v. Central Nat. Bank*, 124 N. Y. 552, 21 Am. St. Rep. 700, 27 N. E. 247.

U. S.—*Aetna Nat. Bank v. Man-*

hattan L. Ins. Co., 24 Fed. 769, proceeds of assigned policies and premiums and interest paid by an insolvent on policies payable to his wife can be reached.

Ga.—*Stenson v. Williams*, 35 Ga. 170, if a judgment creditor has pursued his legal remedies to every available extent without success.

Ill.—*Hitt v. Ormsbee*, 14 Ill. 233.

Me.—*Sargent v. Salmond*, 27 Me. 539.

Mass.—*Drake v. Rice*, 130 Mass. 410; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383.

Mich.—*Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159, a policy taken out for the benefit of the estate of the assured, and not for the sole benefit of his wife and

dictions the rule is maintained that such property, not being subject to execution at common law, cannot be subjected in equity to the satisfaction of the claims of creditors.³³ In most jurisdictions, either by express statutory enactments, or under

daughter, cannot be assigned to them so as to place it beyond the reach of his creditors.

Miss.—*Catchings v. Manlove*, 39 Miss. 655, equity will avail to subject the avails of a life insurance policy voluntarily assigned by an insolvent debtor to his wife and children; *Wright v. Petrie*, 1 Sm. & M. Ch. (Miss.) 282, a transfer of a chose in action by a release of a mortgage and the liability due thereunder is fraudulent.

Mo.—*Pendleton v. Perkins*, 49 Mo. 565.

Neb.—*Rogers v. Jones*, 1 Neb. 417.

N. H.—*Abbott v. Tenney*, 18 N. H. 109; *Tappan v. Evans*, 11 N. H. 311.

N. J.—*Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55, the assignment by a debtor of his claim for damages for personal injuries by a railroad collision for \$330 to an attorney, who prosecuted it to judgment and recovered in the name of the debtor \$4,000, was void as to antecedent creditors so far as the amount recovered exceeded reasonable compensation for the attorney's services.

N. C.—*Burton v. Farinholt*, 86 N. C. 260; *Powell v. Powell*, 63 N. C. 283.

Ohio.—*Bryans v. Taylor*, *Wright (Ohio)*, 245.

Pa.—*Elliott's Appeal*, 50 Pa. St. 75, 88 Am. Dec. 525.

Eng.—*Ryall v. Rolle*, 1 Atk. 165, 26 Eng. Rep. 107, 1 Ves. 348, 27 Eng. Reprint, 1074; *Partridge v. Gopp*, Amb. 596, 27 Eng. Reprint, 388, 1 Eden, 163, 28 Eng. Reprint, 647;

King v. Dupine, 2 Atk. 603, note, 26 Eng. Reprint, 760; *Taylor v. Jones*, 2 Atk. 600, 26 Eng. Reprint, 768.

38. *Ala.*—*Henderson v. Hall*, 134 Ala. 455, 32 So. 840.

Ark.—*Matlock v. Bledsoe (Ark.)*, 90 S. W. 848, an administrator may not attack his intestate's assignment of his life insurance as in fraud of creditors.

Ind.—*Stewart v. English*, 6 Ind. 176.

Ky.—*McFerran v. Jones*, 2 Litt. (Ky.) 219.

Md.—*Harper v. Clayton*, 84 Md. 346, 57 Am. St. Rep. 407, 35 Atl. 1083, 35 L. R. A. 211, 44 Cent. L. J. 97, an unassigned right of dower cannot be reached by a creditor's bill, in the absence of a statute; *Watkins v. Dorsett*, 1 Bland. 530.

Mich.—*Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792, interest of mortgagee.

N. J.—*Green v. Tantum*, 19 N. J. Eq. 105.

R. I.—*Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400.

Tew.—*White Sewing Mach. Co. v. Atkinson*, 75 Tex. 330, 12 S. W. 812. But see *Taylor v. Gillean*, 23 Tex. 508.

Can.—*Blakely v. Gould*, 24 Ont. App. 153, assignment of prospective profits under an executory contract; *Lodor v. Creighton*, 9 U. C. C. P. 295, assignment of mortgage.

Eng.—*Norcutt v. Dodd*, Cr. & Ph. 100, 41 Eng. Reprint, 423; *Rider v. Kidder*, 10 Ves. Jr. 360, 32 Eng. Reprint, 884; *Stokoe v. Cowan*, 29

statutes rendering them liable to attachment, execution, or garnishment, choses in action, when fraudulently transferred or assigned by debtors, like any other property fraudulently conveyed may be reached by creditors in equity, and under some statutes even at law.³⁹ If the effect, not necessarily the object, of the assignment or transfer is to defeat, hinder, or delay one particular creditor only, the assignment or transfer will be void under the statute.⁴⁰ This general rule under the statutes has

Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint, 775; *Sims v. Thomas*, 9 L. J. Q. B. 399, 12 A. & E. 536, 4 P. & D. 233, 40 E. C. L. 268, a bond is not goods and chattels within 13 Eliz. chap. 5; *Corogan v. Cooke*, 2 Ball. & B. 233; *McCarthy v. Goold*, 1 Ball. & B. 387; *Dundas v. Dutens*, 2 Cox. Ch. 235, 30 Eng. Reprint, 109, 1 Ves. Jr. 196, 1 Rev. Rep. 112, 30 Eng. Reprint, 298.

39. *Ala.*—*Hall & Farley v. Alabama Term. & Imp. Co. (Ala.)*, 39 So. 285.

Cal.—*Ballou v. Andrews Banking Co.*, 128 Cal. 562, 61 Pac. 102, assignment of book account.

Conn.—*Enos v. Tuttle*, 3 Conn. 27.

Ind.—*Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75, fraudulent transfer of the capital stock of a corporation.

Ky.—*Burnes v. Cade*, 73 Ky. 251; *Davis v. Sharron*, 54 Ky. 64.

La.—*North v. Gordon*, 15 La. Ann. 221.

Me.—*Spaulding v. Fisher*, 57 Me. 411.

N. J.—*Tenbrook v. Jessup*, 60 N. J. Eq. 234, 46 Atl. 516; *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205; *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55; *Tantum v. Green*,

21 N. J. Eq. 364, *aff'g* 19 N. J. Eq. 105.

Ohio.—*Maclaren v. Stone*, 18 Ohio Cir. Ct. 854, 9 Ohio Cir. Dec. 794, release by husband of his dower interest in lands of his deceased wife to his children; *Newark v. Funk*, 15 Ohio St. 462.

R. I.—*Beckwith v. Borroughs*, 14 R. I. 366, 51 Am. Dec. 392.

Wis.—*Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 163; *LaCrosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. 153.

Can.—*Upper Canada Bank v. Shickluna*, 10 Grant Ch. (U. C.) 157.

Eng.—*Edmunds v. Edmunds*, 73 L. J. P. 97, P. 362, 91 L. T. 568, since choses in action became attachable by Common Law Procedure Act, 1854, § 60 *et seq.*, an assignment of them may be void under 13 Eliz. c. 5, as tending to defeat, hinder or delay creditors. See also Stat. 1 and 2 Vict. c. 110, § 12; *Stokoe v. Cowan*, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint, 775; *Warden v. Jones*, 2 DeG. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint, 916; *Barrack v. McCulloch*, 3 Jur. N. S. 180, 3 Kay. L. J. 110, 26 L. J. Ch. 105, 5 Wkly. Rep. 38.

40. *Edmunds v. Edmunds*, 73 L. J. P. 97, P. 362, 91 L. T. 568.

been held to apply to the transfer or assignment of promissory notes,⁴¹ drafts,⁴² money and bank bills,⁴³ accounts and balances due on accounts,⁴⁴ debts due under contract for the sale of land,⁴⁵ rents due under a lease,⁴⁶ mortgages,⁴⁷ stock of a corporation,⁴⁸ subscriptions for stock in corporations,⁴⁹ life insurance policies,⁵⁰

41. *Conn.*—Enos v. Tuttle, 3 Conn. 27.

La.—North v. Gordon, 15 La. Ann. 221.

Me.—Sargent v. Salmond, 27 Me. 539.

Neb.—Rogers v. Jones, 1 Neb. 417.

Wis.—Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; LaCrosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153.

42. LaCrosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153, non-leviable assets, things in action, evidences of debt, credits and effects, and any property held by any sort of conveyance or title void as to the creditors of the principal debtor, may be garnished, under Wis. Rev. Stat., § 2768.

43. *N. Y.*—Hadden v. Spader, 20 Johns. 554; Spader v. Davis, 5 Johns. Ch. 280; Bayard v. Hoffman, 4 Johns. Ch. 451.

U. S.—Shainwald v. Lewis, 6 Fed. 766, 770, 7 Sawy. 148.

Ind.—Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. F. 817.

Me.—Spaulding v. Fisher, 57 Me. 411.

S. C.—Brenan v. Burke, 6 Rich. Eq. 200, money of debtor in hands of sheriff.

44. Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102; Drake v. Rice, 130 Mass. 410.

45. Hitt v. Ormsbee, 14 Ill. 223.

46. Daugherty v. Bogg, 3 Ind. T. 197, 53 S. W. 542.

47. Wright v. Petrie, Sm. & M. Ch. (Miss.) 282; Tantom v. Green, 21 N. J. Eq. 364; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; Upper Canada Bank v. Shickluna, 10 Grant Ch. (U. C.) 157.

48. *N. Y.*—Weed v. Pierce, 9 Cow. 722; Edmeston v. Lyde, 1 Paige, 637, 19 Am. Dec. 454; Bayard v. Hoffman, 4 Johns. Ch. 450.

Ind.—Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; Scott v. Indianapolis Wagon Works, 48 Ind. 75.

R. I.—Beckwith v. Burrough, 14 R. I. 366, 51 Am. Dec. 392.

Eng.—Warden v. Jones, *supra*; Barrack v. McCulloch, *supra*.

49. *U. S.*—Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; Hadley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; Marsh v. Burroughs, 16 Fed. Cas. No. 9,112, 1 Woods. 463.

Ohio.—Henry v. Vermillion R. Co., 17 Ohio, 187; Miers v. Zanesville, etc., Turnpike Co., 14 Ohio, 273; 13 Ohio, 197.

Wis.—Pierce v. Milwaukee Constr. Co., 38 Wis. 253.

50. Catchings v. Manlove, 39 Miss. 655; Burton v. Farinholt, 86 N. C. 260; Stokoe v. Cowan, *supra*. See Life insurance, chap. IV, § 20, *infra*.

legacies,⁵¹ annuities,⁵² distributive shares in a decedent's estate,⁵³ unassigned dower interest,⁵⁴ judgments,⁵⁵ claims for damages for torts with respect to property,⁵⁶ and for damages for personal injuries.⁵⁷ But it has been held in other cases that a debtor's mere right of action for a personal tort, as for assault and battery, slander, malicious prosecution, and other personal injuries, cannot be reached by a creditor's bill.⁵⁸ Nor can the debtor's right of action for a conversion of property exempt from execution be reached in equity.⁵⁹ The cancellation or release of a mortgage or other debt by an insolvent debtor, without consideration, is fraudulent and void as to existing creditors.⁶⁰ The

51. *Bigelow v. Ayrault*, 46 Barb. (N. Y.) 143; *Taylor v. Jones*, 2 Atk. 600, 26 Eng. Reprint, 758.

52. *De Hierapolis v. Lawrence*, 115 Fed. 761; *Norcutt v. Dodd*, Cr. & Ph. 100, 41 Eng. Reprint, 428; *King v. Dupine*, 2 Atk. 603, note, 26 Eng. Reprint, 760.

53. *Smith v. Patton*, 194 Ill. 638, 62 N. E. 794, surrender of right to contest will as consideration for conveyance; *Moore v. White*, 3 Gratt. (Va.) 139.

54. See *Wife's dower or other interest in husband's property*, chap. IV, § 38, *infra*.

55. *Egberts v. Pemberton*, 7 Johns. Ch. (N. Y.) 208; *North v. Gordon*, 15 La. Ann. 221.

56. *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176; *Hudson v. Plets*, 11 Paige (N. Y.), 180; *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197; *Dening v. Nelson*, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215. See also *Ten Broeck v. Sloo*, 13 How. Pr. (N. Y.) 28.

57. *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55. See note 37, *supra*.

58. *Hudson v. Pletz*, 11 Paige (N.

Y.) 180; *Bennett v. Sweet*, 171 Mass. 600, 51 N. E. 183, a verdict for personal injuries before judgment has been entered thereon is not property which can be reached in equity.

59. *Hudson v. Pletz*, 11 Paige (N. Y.) 180, although a right of action for the destruction or injury of property liable to execution may be.

60. *Ind.*—*Johnson v. Jones*, 79 Ind. 141, surrender of notes and mortgages.

Mass.—*Martin v. Root*, 17 Mass. 222.

N. H.—*Everett v. Read*, 3 N. H. 55.

N. J.—*Youngs v. Public School Trustees*, 31 N. J. Eq. 290.

Can.—*Upper Canada Bank v. Shickluna*, 10 Grant Ch. (U. C.) 157, discharge of mortgage without consideration.

Eng.—*Sibthorp v. Moxon*, 3 Atk. 581, 26 Eng. Reprint, 1134, 1 Ves. 49, 27 Eng. Reprint, 883, the cancellation of a debt by will is not valid as against creditors. See chap. II, § 19, *supra*.

Accident policy.—Where a wife took out an accident policy insuring her husband, who was made beneficiary therein, and the only

voluntary release by an insolvent grantor of the covenant of his grantee to assume and pay a debt secured by mortgage on the premises is fraudulent and void as to creditors, if the effect of the release is to hinder or defraud creditors.⁶¹ But a judgment creditor cannot impeach a release, by an insolvent debtor, of a mere contingent obligation.⁶²

§ 8. **Earnings or wages of debtor.**—Where a debtor assigns his earnings or wages after they become due, without consideration, or with intent to hinder, delay, or defraud his creditors, they may be reached in equity by the creditors, like any other chose in action, if they are not by law exempt from the claims of creditors.⁶³ No agreement entered into by a debtor, with a view to deprive his creditors of his future earnings, under either an existing or future contract, and enable him to retain and use them for his own benefit, is valid as against them.⁶⁴ But

reference to the wife was in the application which provided that the policy in case of death should be payable to the wife, and the wife paid the premiums thereon, and the husband assigned all his interest in the policy to his wife, and thereafter he was injured, the assignment was not fraudulent as to the creditors of the husband. *Weckerly v. Taylor* (Neb. 1906), 110 N. W. 738.

61. *Youngs v. Public School Trustees*, 31 N. J. Eq. 290, but such release, although without consideration, is valid if the grantor is solvent.

62. *McGay v. Keilback*, 14 Abb. Pr. (N. Y.) 142.

63. *Wolfsberger v. Mort*, 104 Mo. App. 257, 78 S. W. 817, an insolvent debtor cannot systematically give practically all earnings to his wife, and thereby allow her to accumulate property in her own name, which, if acquired by him, would be subject to levy; *Robinson v. McKenna*, 21 R. I.

117, 42 Atl. 510, an assignment of wages to secure a present indebtedness and future advances of goods and merchandise is not good as against creditors, so as to include money paid over to the assignor out of the wages under an agreement to that effect outside of the assignment; *Dow v. Taylor*, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775, where a debtor assigned his wages for a debt honestly due, but also to prevent other creditors trusteeing his employer for the excess over the debt, the assignment was within the statute against fraudulent conveyances; *Moran v. Moran*, 12 Bush. (Ky.) 301.

64. *Tripp v. Childs*, 14 Barb. (N. Y.) 85; *Lennon v. Parker*, 21 R. I. 43, 46 Atl. 44, defendant's assignment of wages to a creditor, who collected the same and turned them over to defendant, retaining a small part to apply on his claim, was fraudulent.

where the assignment is given for a valid and valuable consideration,⁶⁵ or made in consideration of necessities to be furnished to the assignor for the support of himself and his family,⁶⁶ or where wages and earnings of the debtor are exempted by statutes from the claims of creditors,⁶⁷ such an assignment is good as against creditors. An employer cannot be garnished by his employee's creditor where he has paid the employee's wages in advance, so that at the time of service there is nothing due the latter, although they were paid in advance for the purpose of avoiding liability to garnishment.⁶⁸ A creditor cannot coerce a debtor to labor for his benefit, and a debtor is not obliged to apply the proceeds of his labor to the benefit of his creditor, leaving his family to suffer want.⁶⁹ A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family, without becoming in any way answerable to his creditors.⁷⁰ But, as against them, she cannot appropriate such earnings or income to make investments in her own name, either for him or herself, or to keep down or pay off incumbrances on or otherwise improve her own property, or to pay the debts or increase the profits of her separate business.⁷¹ The fact that a part of the price of a house and lot conveyed to the wife for a home, and the cost of the improvements thereon necessary for the comfort of the family, are paid for out of the husband's earnings, but not exceeding the amount which is

lent; *Gragg v. Mastin*, 12 Allen (Mass.), 498, 90 Am. Dec. 164; *Robinson v. McKenna*, *supra*; *Dow v. Taylor*, *supra*.

65. *Lannan v. Smith*, 7 Gray (Mass.), 150; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Boylan v. Leonard*, 2 Allen (Mass.), 407; *Dole v. Farwell*, 72 N. H. 183, 55 Atl. 553; *Fradd v. Charon*, 69 N. H. 189, 44 Atl. 910.

66. *Dole v. Farwell*, 72 N. H. 183, 55 Atl. 553; *Provencher v. Brooks*, 64 N. H. 479, 13 Atl. 641; *Lannan v.*

Smith, *supra*; *Emery v. Lawrence*, *supra*.

67. See Exempt earnings or wages, chap. IV, § 41, *infra*.

68. *Van Vleet v. Stratton*, 91 Tenn. 473, 19 S. W. 428.

69. *Van Vleet v. Stratton*, 91 Tenn. 473, 19 S. W. 428; *Leslie v. Joyner*, 2 Head. (Tenn.) 514.

70. *Trefethen v. Lynam*, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; *Coyne v. Sayre*, 64 N. J. Eq. 702, 39 Atl. 96.

71. *Trefethen v. Lynam*, *supra*.

necessary for the reasonable support of the family, does not render the conveyance fraudulent as against the husband's creditors.⁷² The obligation of a husband to support his family is paramount to that of paying his debts, and such support involves provision of a home to shelter, as well as raiment to clothe, or food to sustain life.⁷³ A judgment creditor has no right to the products of his debtor's labor, which became as soon as produced the property of a third person, and it is immaterial that the debtor refused to make the contract to furnish the products directly, fearing that they might be subjected to the judgment debt, but procured a contract to be made by his wife.⁷⁴

§ 9. **Earnings, services, and savings of wife.**—The common law rule that the wife's earnings belong to the husband, and that he cannot give or voluntarily relinquish them to her, or invest them, or permit her to invest them, in property in her own name, and thus withdraw them or the property from the claims of his existing creditors, still prevails, in the absence of statute, and the earnings of the wife while cohabiting with her husband are not made her separate property by the Married Woman's Acts in the absence of express provision in such acts.⁷⁵

72. *Eversole v. Bullock*, 26 Ky. L. Rep. 1098, 83 S. W. 556; *Green v. Buckler*, 19 Ky. L. Rep. 286, 40 S. W. 382; *O'Gorman v. Madden*, 9 Ky. L. Rep. 567, 5 S. W. 756; *Coyne v. Sayre*, *supra*.

73. *Greene v. Buckler*, *supra*.

74. *Buckley v. Dunn*, 67 Miss. 710, 19 Am. St. Rep. 334, 7 So. 550.

75. *U. S.*—*Seitz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179, *aff'g* 1 McArthur (D. C.), 480; *Union Trust Co. v. Fisher*, 25 Fed. 178.

Ala.—*Bates v. Morris*, 101 Ala. 282, 13 So. 138; *Bangs v. Edwards*, 88 Ala. 382, 6 So. 764; *Carter v. Worthington*, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738; *Wing v. Roswald*, 74 Ala. 346; *Gordon v. Tweedy*, 71

Ala. 202; *Evans v. Covington*, 70 Ala. 440; *Glaze v. Blake*, 56 Ala. 379; *McLemore v. Nuckolls*, 37 Ala. 62; *Pinkston v. McLemore*, 31 Ala. 308.

Conn.—*Hinman v. Parkis*, 33 Conn. 188.

Ga.—*Georgia R. & Banking Co. v. Tice*, 124 Ga. 459, 52 S. E. 916.

Ill.—*Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486; *Schwartz v. Saunders*, 46 Ill. 18.

Iowa.—*Duncan v. Roselle*, 15 Iowa, 501.

Ky.—*Penn v. Young*, 10 Bush, 626; *Uhrig v. Horstman*, 8 Bush, 172; *Musgrave v. Parish*, 10 Ky. L. Rep. 998, 11 S. W. 464, the proceeds of the labor of a married woman, un-

But, as against subsequent creditors, a gift or voluntary renunciation by a husband to his wife of her earnings is valid at common law, unless successfully assailed for intentional fraud.⁷⁶ In most jurisdictions the common law rule has been changed or modified by statutes which give a married woman the right to her earnings in carrying on a separate business with the express or implied consent of her husband, or after desertion by him.⁷⁷

less derived from an employment by or under a third person, belong to her husband.

Miss.—Apple v. Ganong, 47 Miss. 189.

N. H.—Hoyt v. White, 46 N. H. 45.

N. J.—Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594. But see Tresch v. Wirtz, 34 N. J. Eq. 124, prior to N. J. Statute, a husband could make a valid gift or relinquishment to his wife of her earnings, even against creditors whose debts had already been contracted.

S. C.—McAfee v. McAfee, 28 S. C. 188, 5 S. E. 480; Bridgers v. Howell, 27 S. C. 425, 3 S. E. 790.

Tenn.—Cox v. Scott, 9 Baxt. 305.

Va.—Grant v. Sutton, 90 Va. 771, 19 S. E. 784, prior to the taking effect of the Virginia Code, May 1, 1888; Campbell v. Bowles, 30 Gratt. 652.

W. Va.—Bailey v. Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847. See also chap. VIII, § 43, *infra*.

76. Bates v. Morris, *supra*; Bangs v. Edwards, *supra*; Wing v. Roswald, *supra*; Glaze v. Blake, *supra*; Pinkston v. McLemore, *supra*; Bowman v. Ash, *supra*. But when a husband said to his wife that she might have certain earnings of hers to do with as she pleased, but still used them in his business, and gave no receipt therefor, and she asserted no

claim thereto for fourteen years, the gift could not then be established in equity as against his subsequent creditors. Evans v. Covington, 70 Ala. 440. See also Carleton v. Rivers, 54 Ala. 467; Shaeffer v. Sheppard, 54 Ala. 244, the Alabama statutes have not changed the common law rule giving the husband the earnings of the wife, so that she has no separate estate in the compensation for her services in keeping a boarding house, carried on in the name of her husband, or in money spent by her husband in paying a debt for lands purchased by him, which money was earned by the wife carrying on a farm for several years.

77. *N. Y.*—Stevens v. Cunningham, 181 N. Y. 454, 74 N. E. 434, *rev'g* 75 App. Div. 125, 77 N. Y. Supp. 364, the enabling statutes have no effect upon those duties which a wife owes to the husband at common law in the marriage relation.

Ala.—Reeves v. McNeill, 127 Ala. 175, 28 So. 623; Bates v. Morris, *supra*; Carter v. Worthington, *supra*; Wing v. Roswald, *supra*.

Conn.—Whiting v. Beckwith, 31 Conn. 596.

Ill.—Bowman v. Ash, 143 Ill. 649, 32 N. E. 486; Partridge v. Arnold, 73 Ill. 600.

Ind.—Boots v. Griffith, 89 Ind. 246.

Iowa.—Hedge v. Glenney, 75 Iowa,

But the earnings of the wife, in order that they may be exempt from liability for the husband's debts, must have accrued to her from services rendered to a third party in conducting a separate business, distinct from the common law duties she owes her hus-

513, 39 N. W. 818, 1 L. R. A. 479, the keeping of boarders by a married woman is such business and entitles her to the proceeds under the Iowa statute. See also *King v. Wells*, 106 Iowa, 649, 77 N. W. 338, subsequent creditors of the husband cannot subject to the payment of their claims land held by a wife obtained through her labor and prudent management, although the husband worked with her and aided with his labor in purchasing it; *Carse v. Reticker*, 95 Iowa, 25, 63 N. W. 461, 58 Am. St. Rep. 421, profits of a wife in a contract for boarding prisoners.

Kan.—*Larimer v. Kelly*, 10 Kan. 298.

Ky.—*Clark v. Meyers*, 24 Ky. L. Rep. 380, 68 S. W. 853, the wife's earnings under an employment by her husband as agent of another may be held by her free from the husband's creditors; *Wallace v. Mason*, 100 Ky. 560, 18 Ky. L. Rep. 935, 38 S. W. 887, real estate paid for by the labor of a wife is not subject to a judgment against her husband; *Rath v. Rankins*, 17 Ky. L. Rep. 1120, 33 S. W. 832, the proceeds received by a wife from the sale of produce, the products of her industry, are not subject to the payment of her husband's debts under the Kentucky statute; *Carter v. Drewery*, 4 Ky. L. Rep. 888.

Mass.—*Draper v. Buggee*, 133 Mass. 258, where a wife paid, with money earned by her own labor a note of her husband and a mortgage on land owned by him, the convey-

ance of the land to her was not in fraud of creditors.

Mo.—*Furth v. March*, 101 Mo. App. 329, 74 S. W. 147, the earnings of the wife in keeping boarders not subject to husband's debts; *Gruner v. Scholz*, 154 Mo. 415, 55 S. W. 441, drug business conducted by wife with assistance of her husband; *Bartlett v. Behrens*, 94 Mo. 530, 7 S. W. 581, where a married woman loaned to her husband earnings accumulated by her with his consent, which were afterwards advanced by him for the purchase of real property for her, the deed was not fraudulent; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Coughlin v. Ryan*, 43 Mo. 99, 97 Am. Dec. 375; *Beach v. Baldwin*, 14 Mo. 597; *Baer v. Pfaff*, 44 Mo. App. 35.

N. J.—*Costello v. Prospect Brew. Co.*, 52 N. J. Eq. 357, 30 Atl. 682, a wife who pays with her own and her children's earnings part of a mortgage on land voluntarily conveyed to her by her husband is entitled, where the conveyance is set aside as fraudulent, to a lien for the amount paid by her; *Peterson v. Mulford*, 36 N. J. L. 481; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13; *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472.

Pa.—*Phillips v. Hall*, 160 Pa. St. 60, 28 Atl. 502, personal property purchased in part by wife's earnings in keeping boarders; *Holcomb v. People's Sav. Bank*, 92 Pa. St. 338; *Bucher v. Ream*, 68 Pa. St. 421; *Brown v. Pendleton*, 60 Pa. St. 419.

band in the marital relation, and not in the discharge of the ordinary duties of a wife to her husband, or the duties which he owes to another, an inmate of his family, or merely assisting the husband in his business.⁷⁸

§ 10. **Earnings or wages of debtor's minor child.**—The services and the earnings or wages of a minor child belong to the father, unless the child has been emancipated and his future earnings made his own, and a conveyance by a father to his minor child, in consideration for the past services of the child during his minority, the father being indebted at the time, though valid

But see *Leinbach v. Templin*, 105 Pa. St. 522.

Tenn.—*Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484, property purchased by earnings of wife in keeping boarders and as a seamstress.

Vt.—*Premo v. Hewitt*, 55 Vt. 362.

Va.—*Grant v. Sutton*, 90 Va. 71, 19 S. E. 784; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478.

W. Va.—*Stewart v. Stout*, 38 W. Va. 478, 18 S. E. 726; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Can.—*Bohaker v. Morris*, 20 Nova Scotia, 212; *Murray v. McCallum*, 8 Ont. App. 277.

Eng.—*Ashworth v. Outram*, 5 Ch. D. 923, 46 L. J. Ch. 687, 37 L. T. Rep. N. S. 85, 25 Wkly. Rep. 896; *LaPorte v. Costick*, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

78. *N. Y.*—*Stevens v. Cunningham*, 181 N. Y. 454, 74 N. E. 434, services of a wife rendered to a third party as a nurse or attendant; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160, services of the wife rendered to her husband in taking care of his mother, who was a member of his household and whom he had agreed to support in consideration of the conveyance to him of cer-

tain lands, in payment for which services the husband conveyed real estate to his wife through a third person, were held not a valid consideration and the conveyance void as to creditors.

Ga.—*Dumas v. Neal*, 51 Ga. 563, a wife's claim that, by agreement with her husband, she was to have one-half the proceeds of a boarding house, for helping him carry it on, was in fraud of creditors.

Iowa.—*Langford v. Thurlby*, 60 Iowa, 105, 14 N. W. 135, the voluntary conveyance by a husband to a wife of property acquired in his name, by their joint industry and management, cannot be upheld to the prejudice of existing creditors.

N. J.—*Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13, the proceeds of a business carried on by a husband and wife in co-operation will be considered that of the husband, and will not be protected for her, as against creditors; *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472.

S. C.—*McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480.

Eng.—*LaPorte v. Costick*, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

as between father and child, is a voluntary conveyance, without legal consideration, and therefore fraudulent and void as to the creditors of the parent, and the property may be reached in equity and subjected by existing creditors of the parent.⁷⁹ The services of a son rendered during minority to his father cannot be set up as part of a valuable consideration of a deed from the latter to the former, and a conveyance from a father to his minor son, paid for in part by money which he had earned in wages and his note for the rest of the price, is fraudulent and void as to creditors.⁸⁰ The investment by a father of the earnings of minor children in real estate in their names cannot protect the property from his debts.⁸¹ Lands purchased by a mother with earnings of her minor son which he gave her are liable to the father's debts, where the father never emancipated the son.⁸² But a father has no present valuable property in the future labor or earnings of his minor child, and may, acting in good faith, though insolvent at the time, emancipate him, or make a valid gift or release to him of his time and future earnings. And if the father emancipates his child and allows him to contract for and retain his own wages or earnings, whether the child continues as a member of his father's family or provides for his own support and education by his own labor, the father does not thereby withdraw from his creditors any property or funds to which they are legally or justly entitled for the payment of his debts; and hence after such emancipation the child becomes competent to contract as if of full age, and such wages

79. *U. S.*—*Dowell v. Applegate*, 15 Fed. 419, 8 Sawy. 427.

Ala.—*Donegan v. Davis*, 66 Ala. 362; *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58.

Kan.—*Stumbaugh v. Anderson*, 46 Kan. 541, 26 Pac. 1045.

Miss.—*Dick v. Grissom*, 1 Freem. Ch. 428.

N. J.—*Gardner's Adm'r v. Schooley*, 25 N. J. Eq. 150.

N. C.—*North v. York*, 35 N. C. 206.

Pa.—*Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567.

80. *Bullett v. Worthington*, 3 Md. Ch. 99; *Winchester v. Reid*, 53 N. C. 377.

81. *Bell v. Hallenbach*, *Wright* (Ohio), 751.

82. *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 23 Am. St. Rep. 327, 15 S. W. 259.

or earnings, or the property purchased with them or in which they have been invested, by or for the child, cannot be reached and subjected by the father's creditors.⁸³ Profits resulting to the

83. N. Y.—*Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105, *rev'g* 62 Hun, 621, 17 N. Y. Supp. 223; *McCaffrey v. Hickey*, 66 Barb. 489.

Ala.—*Donegan v. Davis*, 66 Ala. 362; *Lyon v. Bolling*, 14 Ala. 753, 48 Am. Dec. 122.

Ark.—*Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406.

Cal.—*Lackman v. Wood*, 25 Cal. 147.

Conn.—*Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386.

Ga.—*Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115, where a father promised his minor child a reasonable part of the prospective crop as compensation for the child's labor.

Ill.—*Heeren v. Kittson*, 28 Ill. App. 259, where a father agreed to pay his minor son as much as any other man would give him for his services until he became of age, and a certain sum thereafter; *Partridge v. Arnold*, 73 Ill. 600.

Ind.—*Jenison v. Graves*, 2 Blackf. 440.

Iowa.—*Bener v. Edgington*, 76 Iowa, 105, 40 N. W. 117; *Wolcott v. Rickey*, 22 Iowa, 171.

Me.—*Lord v. Poor*, 23 Me. 569. Future earnings of minor children are not assets of the father's estate to which creditors have any right to look, so as to prevent their relinquishment by the father, though insolvent, to the children, if he so wills. *Merrill v. Hussey* (Me.) 64 Atl. 819.

Mass.—*Jenney v. Alden*, 12 Mass. 375; *Whiting v. Earle*, 3 Pick. 201, 15 Am. Dec. 207.

Miss.—*Dick v. Grissom*, 1 Freem. Ch. 428.

Mo.—*Mott v. Purcell*, 98 Mo. 247, 11 S. W. 564; *Dierker v. Hess*, 54 Mo. 246.

Neb.—*Shortel v. Young*, 23 Neb. 408, 36 N. W. 572, where the testimony raises a presumption of his emancipation; *Clemens v. Brillhart*, 17 Neb. 335, 22 N. W. 779.

N. H.—*Johnson v. Silsbee*, 49 N. H. 543.

N. J.—*Wisner v. Osborn*, 64 N. J. Eq. 614, 55 Atl. 51, where stock of an incorporation was purchased with the wages of an emancipated son; *Coyne v. Sayre*, 54 N. J. Eq. 702, 36 Atl. 96.

Ohio.—*Geringer v. Heinlein*, 20 Cinc. L. Bul. 339, 6 Ohio S. & C. Pl. Dec. 26.

Or.—*Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645.

Pa.—*Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567; *Appeal of Brown*, 86 Pa. St. 524; *Rush v. Vought*, 58 Pa. St. 437, 93 Am. Dec. 769; *McCloskey v. Cyphert*, 27 Pa. St. 220.

Tenn.—*Rosenbaum v. Davis* (Ch. App.), 48 S. W. 706; *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484; *Leslie v. Joyner*, 2 Head, 514.

Tex.—*Furrh v. McKnight*, 6 Tex. Civ. App. 583, 26 S. W. 95; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 183, 23 Am. St. Rep. 327, 15 S. W. 259.

Vt.—*Bray v. Wheeler*, 29 Vt. 514; *Chase v. Elkins*, 2 Vt. 290.

Va.—*Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478.

separate estate of a wife, whose minor child, with its father's consent, gives her the benefit of his labor on such separate estate, are not liable for the father's debts.⁸⁴

§ 11. **Earnings or wages of public officers or their deputies.**—The same rules are applicable to an assignment or release of the compensation, salary, or fees of a public officer, as are applicable to other earnings or wages of a debtor unless they are expressly exempted by statute.⁸⁵ It has been held, however, that a sheriff may grant to a deputy all the fees earned by the latter, so that they cannot be garnished for the sheriff's debts.⁸⁶

§ 12. **Services, labor, talents, and industry of a debtor.**—The creditors of an insolvent have no claim upon his talents or industry, his labor or services. They cannot compel him to work and earn wages for their benefit, and hence he does not defraud them and they have no legal right to complain, if he chooses to give away his services by working gratuitously for another. It is only the debtor's property that may be reached by creditors.⁸⁷

W. Va.—Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wis.—Wambold v. Vick, 50 Wis. 456, 7 N. W. 438.

Can.—Jack v. Greig, 27 Grant Ch. (U. C.) 6.

See also Earnings or service of child as consideration for conveyance, chap. VIII, §§ 57, 59, *infra*.

84. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; Atwood v. Dolan, 34 W. Va. 563, 12 S. E. 688; Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

85. See chap. IV, § 8, *supra*.

86. Pioneer Printing Co. v. Sanborn, 3 Minn. 413.

87. *N. Y.*—Abbey v. Deyo, 44 N. Y. 343.

U. S.—Voorhees v. Bonesteel, 16 Wall. 16, 31, 21 L. Ed. 268.

Ala.—Nance v. Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378, the labor and skill of a husband in making improvements on his wife's separate estate cannot be charged thereon by his creditors.

Ga.—King v. Skellie, 79 Ga. 147, 151, 3 S. E. 614, it is an invariable principle that the debtor cannot be forced to apply his labor to the extinguishment of his creditor's claim.

Minn.—Eilers v. Conradt, 39 Minn. 242, 39 N. W. 320, 12 Am. St. Rep. 641.

Miss.—Buckley v. Dunn, 67 Miss. 710, 7 So. 550, 10 Am. St. Rep. 334.

Mo.—Gruner v. Scholz, 154 Mo. 415, 55 S. W. 441.

N. J.—Tresch v. Wirtz, 34 N. J. Eq. 124.

Pa.—Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, has ever held to the contrary.⁸⁸ But a debtor may not conduct a business in the name of another, which he uses as a subterfuge to cover his property from the claims of creditors, and by his labor and skill in that undertaking accumulate property for himself and thus defraud his creditors.⁸⁹ But whether or not a business conducted in the name of another is fraudulent is a question of fact for the jury.⁹⁰

§ 13. **Services rendered by husband for wife.**—One cannot by doing business in the name of another defraud his creditors.⁹¹ An insolvent debtor cannot use his wife's name as a mere de-

Tenn.—*Leslie v. Joyner*, 2 Head. 514.

Vt.—*Webster v. Hildreth*, 33 Vt. 457, 78 Am. Dec. 632.

Va.—*Penn. v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478.

W. Va.—*Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Can.—*Baby v. Ross*, 14 Ont. Or. 440.

See also chap. IV, § 8, *supra*.

88. *Abbey v. Deyo*, 44 N. Y. 343, 347.

89. *Nickle v. Emerson Mercantile, etc., Co.* (Ark.) 13 S. W. 78, where property was purchased from funds raised from a business so conducted; *Wilson v. Loomis*, 55 Ill. 352; *Hamilton v. Lightner*, 53 Iowa, 470, 5 N. W. 603, although he loaned his wife the money which was originally invested in the business.

90. *Fass v. Rice*, 30 La. Ann. 1278; *Dunham-Buckley v. Halberg*, 69 Mo. App. 509.

91. *Fass v. Rice*, 30 La. Ann. 1278.

vice to cover up and keep from his creditors the assets and profits of a business which is in fact his own. He cannot defraud his creditors by conducting a business in his wife's name but for his own benefit, thus keeping his property out of the reach of his creditors.⁹² But a husband may donate his services to his wife, in working for or assisting her in a business owned and conducted by her as her separate property, or as her agent in executing a contract made by her with a third person, and, with stronger reason, where the husband is employed by the wife on a salary, and the husband's creditors cannot by reason of such donation of his services or employment reach and subject the property or claims thereby acquired by the wife to the payment of their claims.⁹³ A wife may employ her husband or accept his

92. N. Y.—Abbey v. Deyo, 44 N. Y. 343; O'Leary v. Walter, 10 Abb. Pr. N. S. 430.

Ark.—Nickle v. Emerson Mercantile, etc., Co. (1890), 13 S. W. 78.

Ill.—Lachman v. Martin, 139 Ill. 450, 28 N. E. 795; Robinson v. Brems, 90 Ill. 351; Mattingly v. Obbley, 1 Ill. App. 626.

Iowa.—Hamill v. Augustine, 81 Iowa, 302, 46 N. W. 1113; Hamilton v. Lightner, 53 Iowa, 470, 5 N. W. 603.

Ky.—Gross v. Eddinger, 85 Ky. 168, 8 Ky. L. Rep. 829, 3 S. W. 1; Moran v. Moran, 75 Ky. 301; Farmers' Bank v. Marshall, 18 Ky. L. Rep. 249, 35 S. W. 912.

Mo.—Johnson v. Christie, 79 Mo. App. 46.

Neb.—Wedgwood v. Withers, 35 Neb. 583, 53 N. W. 576.

N. J.—Talcott v. Arnold, 54 N. J. Eq. 570, 35 Atl. 532; Metropolis Nat. Bank v. Sprague, 20 N. J. Eq. 13.

Ohio.—Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98.

Pa.—Blum v. Ross, 116 Pa. St. 163, 10 Atl. 32; Keeney v. Good, 21 Pa.

St. 349. Compare Vowinkle v. Johnston, 9 Pa. Cas. 85, 11 Atl. 634.

Can.—Campbell v. Cole, 7 Ont. 127; In re Gearing, 4 Ont. App. 173; Levine v. Clafin, 31 U. C. C. P. 600; Meakin v. Samson, 28 U. C. C. P. 355; Foulds v. Curtelett, 21 U. C. C. P. 368; Lett v. Commercial Bank, 24 U. C. Q. B. 552; Harrison v. Douglass, 4 U. S. Q. B. 410.

Eng.—Lovell v. Newton, 4 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366; Laporte v. Costick, 31 L. T. Rep. N. S. 434, 23 Wkly. Rep. 131.

93. N. Y.—Abbey v. Deyo, 44 N. Y. 343; Gage v. Dauchy, 34 N. Y. 293; Buckley v. Wells, 33 N. Y. 518; Kluender v. Lynch, 2 Abb. Dec. 538.

U. S.—Garner v. Second Nat. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 37 L. Ed. 218; Aldridge v. Muirhead, 101 U. S. 397, 25 L. Ed. 1013; Voorhees v. Bonesteel, 16 Wall. 16, 21 L. Ed. 268; Hyde v. Frey, 28 Fed. 819.

Ala.—Hoot v. Sorrell, 11 Ala. 386.

Ark.—Nickle v. Emerson Mercantile, etc., Co., *supra*.

services in running her business without subjecting the property to the claims of his creditors.⁹⁴ The personal skill and labor of a husband, expended in making valuable improvements on his wife's property, cannot be reached or subjected by his creditors to the satisfaction of their claims.⁹⁵ Inventions perfected by a husband and patents therefor, where a salary and expenses are paid by the wife out of her separate estate, and the husband acts merely as her employee, are her separate property and not subject to his debts.⁹⁶ Where a husband has no interest in his wife's business, which he is managing as her agent, her title to the property, as against claims of his creditors, is not impaired by

Del.—Kirkley v. Larcey, 7 Houst. 213, 30 Atl. 994.

Ill.—Lachman v. Martin, *supra*; Sexton v. Martin, 37 Ill. App. 537; Olsen v. Kern, 10 Ill. App. 578.

Ind.—Cooper v. Ham, 49 Ind. 393.

Iowa.—McCormick Harvester Mach. Co. v. Pouder, 123 Iowa, 17, 98 N. W. 303; King v. Wells, 106 Iowa, 649, 77 N. W. 338.

Minn.—Eilers v. Conradt, 39 Minn. 242, 39 N. W. 320, 12 Am. Rep. 641; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Hosfeldt v. Dill, 28 Minn. 469, 10 N. W. 781.

Miss.—Buckley v. Dunn, 67 Miss. 710, 7 So. 550, 19 Am. St. Rep. 334.

Mo.—Tipton v. Adair, 172 Mo. 156, 72 S. W. 510; Seay v. Hesse, 123 Mo. 450, 20 S. W. 1017, 27 S. W. 633; Wolfsberger v. Mort, 104 Mo. App. 257, 78 S. W. 817; Hibbard v. Heckart, 88 Mo. App. 544; Baer v. Pfaff, 44 Mo. App. 35.

N. J.—Arnold v. Talcott, 55 N. J. Eq. 519, 37 Atl. 981; Taylor v. Wands, 55 N. J. Eq. 491, 37 Atl. 315; Tresch v. Wirtz, 34 N. J. Eq. 124.

N. C.—Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

Pa.—Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

S. C.—Hodges v. Cobb, 8 Rich. 50.

Vt.—Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632.

W. Va.—Board of Education v. Mitchell, 40 W. Va. 431, 21 S. E. 1017; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30.

Wis.—Mayers v. Kaiser, 85 Wis. 382, 55 N. W. 688, 39 Am. St. Rep. 849, 21 L. R. A. 623; Second Nat. Bank v. Merrill, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877; Dayton v. Walsh, 47 Wis. 113, 2 N. W. 65, 33 Am. Rep. 757.

Can.—Baby v. Ross, 14 Ont. Pr. 440; Plows v. Maughan, 42 U. C. Q. B. 129; Arnoldi v. Stewart, 17 Quebec Super. Ct. 252.

Eng.—Lovell v. Newton, 14 C. P. D. 7, 39 L. T. Rep. N. S. 609, 27 Wkly. Rep. 366.

94. Gruner v. Scholtz, 154 Mo. 415, 55 S. W. 441.

95. Nance v. Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

96. Arnold v. Talcott, 55 N. J. Eq. 519, 37 Atl. 891.

the fact that a portion of the income is applied to his support.⁹⁷ The wife may carry on business through her husband as agent, and the fact that she employs him and supports him does not raise a presumption of fraud, although it is competent in trying the issue to show his manner of conducting the business.⁹⁸ So the fact that the husband is paid a salary by the wife does not of itself establish that the business belongs to the wife.⁹⁹ The fact that the wife had neither experience in the business nor a separate estate when she contracted to purchase a stock of goods, although a circumstance to be considered in determining the question of fraud, is insufficient in itself to show fraud sufficient to subject the profits of the business and property purchased therewith to the claims of creditors of the husband.¹ It is held in some jurisdictions, however, that if a husband engages in business with his wife's capital and in her name, and owing to his skill and labor large profits accrue therefrom over and above the necessary expenses and indebtedness of the business, including the support of himself, wife, and family, a court of equity will justly apportion such profits between his wife and his existing creditors.² In other jurisdictions it is held that if a married woman advances money from her own separate estate and places the same in the hands of her husband for the purpose of carrying on any general trade, although in the wife's name, and the husband by his labor and skill in that undertaking increases the fund, the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but will be liable for the debts of the husband.³

97. *Abbey v. Deyo*, 44 N. Y. 343; *Voorhees v. Bonesteel*, 16 Wall. (U. S.) 16, 21 L. Ed. 268.

98. *Stanley v. National Union Bank*, 115 N. Y. 122, 22 N. E. 29; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

99. *Johnson v. Christie*, 79 Mo. App. 46.

1. *Catlett v. Alsop*, 99 Va. 680, 3 Va. Sup. Ct. Rep. 491, 40 S. E. 34.

2. *Johnson v. Christie*, *supra*; *Talcott v. Arnold*, 54 N. J. Eq. 570, 35 Atl. 532; *Catlett v. Alsop*, *supra*; *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 94 Am. Dec. 478; *Bogges v. Richards*, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

3. *Robinson v. Brems*, 90 Ill. 351; *Patton v. Gates*, 67 Ill. 164; *Wilson v. Loomis*, 55 Ill. 352; *Wortman v.*

§ 14. **Services rendered by parent for child.**—A parent may not, as against creditors, conduct a business in his child's name, but in fact for his own benefit, using such device as a cloak to cover up his property and earnings and put them out of the reach of creditors,⁴ although he may donate his services to his child the same as to his wife or to a friend.⁵ But a debtor will not be permitted to donate the services and earnings of teams belonging to him to his infant son, to avoid payment of his debts to a creditor for whom such infant son, with such teams, performs labor.⁶

§ 15. **Earnings of debtor's property.**—A debtor may not donate the use of his property to another in fraud of his creditors, and if he does so the earnings of such property may be reached and subjected by his creditors,⁷ except where the property is exempt from the claims of creditors.⁸

§ 16. **Good will of a business.**—The good will of a business has been held to be the subject of a fraudulent conveyance, and to be assets available to creditors.⁹

Price, 47 Ill. 22; Brownell v. Dixon, 37 Ill. 197; Pease v. Barkowsky, 67 Ill. App. 274; Card v. Robinson, 2 Ill. App. 19; Guill v. Hanny, 1 Ill. App. 490; Brooks-Waterfield Co. v. Frisbie, 99 Ky. 125, 35 S. W. 106, 59 Am. St. Rep. 452; Gross v. Eddinger, 85 Ky. 168, 8 Ky. L. Rep. 829, 3 S. W. 1; Moran v. Moran, 75 Ky. 301; Shields v. Lewis, 24 Ky. L. Rep. 822, 70 S. W. 51; Blackburn v. Thompson, 23 Ky. L. Rep. 1723, 66 S. W. 5, 56 L. R. A. 938; Edelmuth v. Wybrant, 21 Ky. L. Rep. 929, 53 S. W. 528; Glidden v. Taylor, 16 Ohio St. 509, 91 Am. Dec. 98.

4. Fass v. Rice, 30 La. Ann. 1278.

5. See chap. IV, §§ 12, 13, *supra*.

6. Tuckey v. Lovell, 8 Ida. 731, 71 Pac. 122.

7. Tuckey v. Lovell, 8 Ida. 731, 71 Pac. 122.

8. Leslie v. Joyner, 2 Head (Tenn.) 514. See also Exempt property, chap. IV, § 41, *infra*.

9. French v. French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint, 1166; Neale v. Day, 4 Jur. N. S. 1225, 27 L. J. Ch. 45, 7 Wkly. Rep. 45, where an attorney, being in insolvent circumstances, assigned the good will of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life, with remainder to himself for life, the settlement of the annuity was void as against his creditors.

§ 17. **Membership in stock of merchant's exchange.**—Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, a seat or membership, or the right to a seat or membership, in a stock exchange, merchant's exchange, or a board of trade, is, according to many authorities, a valuable right, capable of transfer, and correctly decided to be property, which, if fraudulently conveyed or assigned, can be reached in equity and subjected by creditors.¹⁰ Other authorities maintain, however, that a certificate of membership in a stock or a produce exchange, or a board of trade, is not property liable to be subjected to the payment of debts of the holder in legal proceedings.¹¹

§ 18. **Patents, copyrights, and trade marks.**—A patent right or the rights acquired by a patentee on the issue of a valid patent is property, which is subject to the claims of creditors, and may be reached in equity by creditors' bill, and applied to the payment of the debts of the patentee.¹² But unpatented inventions,

10. *N. Y.*—*Platt v. Jones*, 96 N. Y. 24; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Sprogg v. Dichman*, 28 Misc. Rep. 409, 59 N. Y. Supp. 966; *Colby v. Peabody*, 52 N. Y. Super. Ct. 394; *Ritterband v. Baggett*, 42 N. Y. Super. Ct. 556, 4 Abb. N. C. 67; *Grocers' Bank v. Murphy*, 60 How. Pr. 426; *Loudheim v. White*, 67 How. Pr. 467.

U. S.—*Paige v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318; *Hyde v. Woods*, 94 U. S. 523; *In re Page*, 5 Am. B. R. 707, 107 Fed. 89, 46 C. C. A. 160; *In re Ketcham*, 1 Fed. 840; *In re Gallagher*, 19 N. B. R. 224; *Matter of Werder*, 10 Fed. 275, 28 Alb. L. J. 176. *Compare* *In re Sutherland*, 6 Biss. 526, 23 Fed. Cas. No. 13,637.

Cal.—*Habenicht v. Lissak*, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713. *Compare* *Rowe v.*

Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

Mo.—*Eliot v. Merchants' Exch.*, 14 Mo. App. 234, 28 Alb. L. J. 512.

11. *Barclay v. Smith*, 107 Ill. 349, 47 Am. Rep. 437, 28 Alb. L. J. 175; *Pancoast v. Gowen*, 93 Pa. St. 66; *Thompson v. Adams*, 93 Pa. St. 55. The Pennsylvania courts do not go so far as to hold that the seat or membership is not property, but hold that it is not property subject to ordinary process at law.

12. *N. Y.*—*Gillett v. Bate*, 86 N. Y. 87, and want of utility or novelty is no defense to the patentee or his fraudulent assignee; *Barnes v. Morgan*, 3 Hun, 703; *McDermott v. Strong*, 4 Johns. Ch. 689; *Spader v. Davis*, 5 Johns. Ch. 280, 20 Johns. 554.

U. S.—*Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942; *Gorrell v. Dick-*

in which the inventor has only an inchoate right to their exclusive use which he may perfect and render absolute, are not property in such sense that they can be reached by creditors.¹³ The interest of a debtor in the copyright of a book, map, or picture, when fraudulently transferred, may be reached in equity by the creditors,¹⁴ and likewise moneys accruing to the debtor as royalty from the sale thereof.¹⁵ The right to use trade marks, in connection with a manufacturing business, which are not personal, but designate merely the place or establishment at which the goods are manufactured, passes to the assignee in insolvency under the Massachusetts statute.¹⁶

§ 19. **Fire insurance.**—A fire insurance upon property is not an incident to the insured property, but a special agreement with the insured against his own loss, not that of another as grantee, creditor, etc.¹⁷ Hence, the proceeds of or money due on a policy of insurance procured by or issued to a vendee in a conveyance which is void for fraud as against creditors, as to a

son, 26 Fed. 454; *Mathews v. Green*, 19 Fed. 649, a license to use a patented invention may, by a bill in equity, be subjected to sale to pay a judgment. Compare *Ashcroft v. Walworth*, 2 Fed. Cas. No. 580, *Holmes*, 152.

Cal.—*Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120.

Conn.—*Vail v. Hammond*, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330, a patent may be sold in equity for the payment of a debt.

Mass.—*Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 149 Mass. 24, 20 N. E. 318, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309, letters patent may be sold and transferred by a court of equity through its master for the benefit of creditors of their owner; *Barton v. White*, 144 Mass. 281, 10 N. E. 840, 59 Am. Rep. 84, letters patent pass

to the assignee in insolvency, and equity will compel an insolvent to execute an assignment. But see *Carver v. Peck*, 131 Mass. 291, a patent right is not an interest which can be reached by a creditor of the owner in equity under the Massachusetts statute.

R. I.—In *re Keach*, 14 R. I. 571, a patent right passes to the receiver of an insolvent debtor, although, being incorporeal, it cannot be attached at law.

13. *Gillett v. Bate*, 86 N. Y. 87, 94.

14. *Bryan v. University Pub. Co.*, 112 N. Y. 382, 2 L. R. A. 638, 19 N. E. 825; *Stephens v. Cady*, 14 How. (U. S.) 528, 14 L. Ed. 528.

15. *Lord v. Harte*, 118 Mass. 271.

16. *Warren v. Warren Thread Co.*, 134 Mass. 247.

17. *Nippes' Appeal*, 75 Pa. St. 472.

wife upon property conveyed to her by her husband or otherwise in fraud of her husband's creditors, are not proceeds of the property conveyed which creditors can subject to the payment of his debts, or follow, under the rule elsewhere stated,¹⁸ in lieu of such property.¹⁹ This has been held to be the rule although the debtor paid the premiums,²⁰ but it has been held that the creditors have a claim upon the money to the extent of the premiums.²¹ Where a policy on the goods of a debtor was more payable to the mortgagee of the goods as his interest might appear, and a loss occurred, it has been held that a creditor of the debtor might garnish the insurance money in the hands of the insurance company, and, the mortgagee coming in as a claimant, the creditor might attack the mortgage as in fraud of creditors.²²

§ 20. Life insurance policies and proceeds thereof.—The interest of an insolvent debtor in a policy of insurance on his life taken out for the benefit of the estate of the debtor, or payable to himself or his legal representatives, cannot be assigned, surrendered, or otherwise disposed of so as to place it beyond the reach of his creditors, but may be reached in equity and subjected by creditors the same as other choses in action, either during his lifetime or after his death, if fraudulently assigned, surrendered, or otherwise disposed of by him.²³ This rule has been

18. See Following proceeds of property fraudulently conveyed, chap. IV, § 48, *infra*.

19. *Forrester v. Gill*, 11 Colo. App. 410, 53 Pac. 230; *Lerow v. Wilmarth*, 9 Allen (Mass.), 382; *Bornheim v. Beer*, 56 Miss. 149; *Nippes' Appeal*, *supra*. See also *McLean v. Hess*, 106 Ind. 555, 7 N. E. 567.

20. *Forrester v. Gill*, *supra*.

21. *Nippes' Appeal*, *supra*.

22. *Coykendall v. Ladd*, 32 Minn. 529; *North Star Boot & Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. 334.

23. *N. Y.*—*Leonard v. Clinton*, 26 Hun, 288.

U. S.—*Aetna Nat. Bank v. Manhattan Life Ins. Co.*, 24 Fed. 769; *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.

Atl.—*Friedman v. Fennell*, 94 Ala. 570, 10 So. 649.

Conn.—*Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23 Atl. 154.

Ky.—*Stokes v. Coffey*, 8 Bush, 533, where the debtor exchanged a policy payable to himself or his estate for one payable to his wife.

Me.—*Wyman v. Gay*, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238.

held not to apply where the assignment or other disposition of the policy is within the provisions of a statute permitting insurance for the protection of wife or children and exempting it from the claims of creditors,²⁴ but other cases hold that a statute

Mass.—*Anthracite Ins. Co. v. Sears*, 109 Mass. 383.

Mich.—*Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159.

Miss.—*Catchings v. Manlove*, 39 Miss. 655.

N. C.—*Burton v. Farinholt*, 86 N. C. 260.

Ohio.—*Child v. Graham*, 8 Ohio Dec. (Reprint) 294, 7 Cinc. L. Bul. 43.

Pa.—*In re McKown*, 198 Pa. St. 96, 47 Atl. 1111, a voluntary assignment by one, when insolvent, to his wife, of a policy on his life, is presumptively fraudulent; *McCutcheon's Appeal*, 99 Pa. St. 133; *Elliott's Appeal*, 50 Pa. St. 75, 88 Am Dec. 525, an assignment in trust for benefit of wife.

Tenn.—*Walter v. Hattman* (Tenn.), 67 S. W. 476.

Can.—*Prentice v. Steel*, 4 Montreal Super. Ct. 319.

Eng.—*Stokoe v. Cowan*, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint, 775; *Taylor v. Coenen*, 1 Ch. Div. 636, 34 L. T. Rep. N. S. 18; *Freeman v. Pope*, L. R. 9 Eq. 206, 39 L. J. Ch. 148, L. R. 5 Ch. 538, 39 L. T. Ch. 689, 21 L. T. Rep. N. S. 816, 18 Wkly. Rep. 906; *Schondler v. Wace*, 1 Camp. 487; *Jenkyn v. Vaughan*, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214 (since the statutes of 1 and 2 Vict., chap. 110, § 12, bringing insurance policies within 13 Eliz., chap. 5).

²⁴ *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83, the wife may hold the proceeds of a policy which the hus-

band has procured on his own life and assigned to her, less premiums, with interest, paid by him within the statutory period of limitation with intent to defraud creditors; *Morehead's Adm'r v. Mayfield*, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580, the assignment of a policy to the wife of insured is not fraudulent as to his creditors, except as to premiums paid by him when he was insolvent; *Thompson v. Cundiff*, 74 Ky. 567; *Earnshaw v. Stewart*, 64 Md. 513, 2 Atl. 734; *Elliott v. Bryan*, 64 Md. 368, 1 Atl. 614; *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083, a policy assigned in favor of his wife by an insolvent husband entitles her to such insurance to the extent to which, under the statute, it is exempt from the claims of creditors where he pays the premiums; *McCutcheon's Appeal*, 99 Pa. St. 133; *Sebrine v. Brickley*, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189. But see *Child v. Graham*, 8 Ohio Dec. 294, 7 Wkly. Law Bul. 43, where an assignment of a life insurance policy by a husband to his wife was held invalid as to creditors under § 6344 of the Revised Statutes, because made with actual intent to defraud them, the entire proceeds of the policy were subject to the claims of the creditors, and not merely the premiums paid, as provided by § 3629.

Though not acknowledged or recorded, the assignment of a policy is valid under a statute providing that "a gift, transfer or assignment of personal property between husband

protecting as against creditors money payable on a life insurance policy taken out by a husband or father for the benefit of his wife or children, does not cover an assignment to them of a policy payable to himself, his executors, administrators, or assigns.²⁵ Nor does this rule apply where the assignment is within the rule maintained by the courts in some jurisdictions, in the absence of statute, that a debtor may make reasonable provision for his wife and children by life insurance, where there is no intent to defraud creditors.²⁶ Where the contract of insurance was made solely for the benefit of another, although made payable to the debtor or his estate, and an assignment of it was delivered simultaneously with the policy to such other person, the rule has been held not to apply, since the assignment did not transfer anything in which the creditors had an interest.²⁷ So a policy of insurance having no surrender value, or no real value, or a merely trivial value, as an asset for creditors, is held not to be within the rule stated.²⁸ Likewise an assignment or surrender by the beneficiary of insurance upon the life of another, as by a wife of an insurance on the life of her husband during his

and wife shall not be valid as to third persons unless the same be in writing and acknowledged and recorded as chattel mortgages are required by law to be recorded, since the statute does not apply to a policy of insurance which at the time of its assignment had no surrender value. *Morehead's Adm'r v. Mayfield*, *supra*; *Steeley v. Steeley*, 23 Ky. L. Rep. 966, 64 S. W. 642; *Cole v. Marple*, *supra*.

25. *Friedman v. Fennell*, 94 Ala. 570, 10 So. 649; *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159; *Burton v. Farinholt*, 86 N. C. 260. But see *Cole v. Marple*, *supra*, holding to the contrary, and *Tuthill v. Goss*, 89 Hun (N. Y.), 609, 35 N. Y. Supp. 136, holding that such an assigned policy inures to the benefit of

the wife, except as to the premiums paid by the husband in excess of \$500 annually. See also *Judson v. Walker*, *supra*.

26. *Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660; *State v. Tomlinson*, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *David Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877.

27. *Shaver v. Shaver*, 35 App. Div. (N. Y.) 1, 54 N. Y. Supp. 464.

28. *Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23 Atl. 154; *Steeley v. Steeley*, 23 Ky. L. Rep. 996, 64 S. W. 642; *Provident L., etc., Co. v. Fidelity Ins., etc., Co.*, 203 Pa. St. 82, 52 Atl. 34.

life,²⁹ or by a husband of insurance payable to his wife,³⁰ may not be attacked by the creditors of the beneficiary as fraudulent, since the beneficiary has no vested rights or interest in the insurance which a creditor could seize. It is like the disposition of property exempt from execution of which creditors cannot complain. An attempted assignment or transfer of an insurance policy being set aside as fraudulent and void as against creditors, and the insurance having become payable, by the death of the decedent before the judgment annulling the transfer, it has been held that, upon both principle and authority, the full value of the policy having become fixed by the death, the entire insurance insures to the benefit of the creditors, and not merely the cash value thereof.³¹

§ 21. Payment of premiums for life insurance.—In the absence of actual fraud, it is held, as a general rule, that the premiums paid by an insolvent debtor for insurance upon his life, in favor of his wife and children, or either, cannot be recovered by creditors, whether existing or subsequent, as made in fraud of their rights, or the proceeds of the policy subjected to the payment of his debts, to the amount of the premiums paid by the insolvent debtor during insolvency, where the provision for the family is reasonable and not excessive.³² On the other

29. *Smillie v. Quinn*, 90 N. Y. 492, *aff'd* 25 Hun (N. Y.), 332.

30. *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427, 9 Ky. L. Rep. 18.

31. *Continental Nat. Bank v. Moore*, 83 App. Div. (N. Y.) 419, 82 N. Y. Supp. 302, an assignment in contemplation of suicide; *In re McKown*, 198 Pa. St. 96, 47 Atl. 11; *Catchings v. Manlove*, 39 Miss. 655; *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159; *Stokoe v. Cowan*, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. Rep. N. S. 695, 6 Wkly. Rep. 801, 54 Eng. Reprint, 775; *Schondler v. Wace*, 1 Campb. 487.

32. *U. S.*—*Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.

Colo.—*Hendrie, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209.

Ind.—*Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660; *Pence v. Makepeace*, 65 Ind. 345; *Foster v. Brown*, 65 Ind. 234.

Ky.—*Hise v. Hartford Life Ins. Co.*, 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358; *Thomson v. Cundiff*, 74 Ky. 567; *Stokes v. Coffee*, 71 Ky. 533, the amount of the policy ought to be no more than will be sufficient to provide reasonable

hand, it is held in some jurisdictions that payments made by an insolvent debtor on a policy of insurance on his own life, for the benefit of his wife or children, are voluntary gifts to the beneficiary and are fraudulent and void as to creditors existing at the time of such payments.³³ In some jurisdictions it is held that where an insolvent debtor voluntarily pays premiums on a policy of insurance on his life for the benefit of his wife, or children, or another, in fraud of his creditors, the latter may in equity reach and subject the full amount of the insurance in the hands of the insurance company,³⁴ the policy or insurance which it represents being regarded as the subject of the gift, and not the premiums paid.³⁵ More generally, however, the rule is maintained, in such cases, that the creditors of the debtor may reach and subject the insurance to the payment of their claims only to the extent of the premiums so paid, with interest,³⁶ the insur-

support for the wife and family and the education of the children.

Neb.—David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

Pa.—Elliott's Appeal, 50 Pa. St. 75, 88 Am. Dec. 525.

33. Fearn v. Ward, 65 Ala. 33, 80 Ala. 555, 2 So. 114; First Nat. Bank v. Simpson, 152 Mo. 638, 54 S. W. 506; First Nat. Bank v. White, 60 N. J. Eq. 587, 46 Atl. 1092; Merchants', etc., Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272; Stigler v. Stigler, 77 Va. 163.

34. Lehman v. Gunn, 124 Ala. 217, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112; Stone v. Knickerbocker L. Ins. Co., 52 Ala. 589; Fearn v. Ward, *supra*; First Nat. Bank v. White, *supra*.

An insurance policy or the proceeds is not an asset of the estate of a decedent applicable to the payment of his debts, where the policy is payable to another than him-

self or his legal representatives, although he may have paid the premiums. Jones v. Patty, 73 Miss. 179, 18 So. 794; Bishop v. Curphey, 60 Miss. 22. See also Simmons v. Biggs, 99 N. C. 236, 5 S. E. 235; Conigland v. Smith, 79 N. C. 303.

A policy of insurance upon the decedent's life which made the amount insured payable "to the said assured, his executors, administrators or assigns, for the benefit of his widow, if any," belongs to the widow, and was recovered by the executor not as an asset of the estate, but as a trustee under the policy for the widow. Matter of Van Dermoor, 42 Hun (N. Y.), 326.

35. Lehman v. Gunn, *supra*.

36. N. Y.—Shaver v. Shaver, 35 App. Div. 1, 54 N. Y. Supp. 644.

U. S.—Aetna Nat. Bank v. U. S. Life Ins. Co., 24 Fed. 770; In re Bear, 2 Fed. Cas. No. 1,178, 11 Nat. Bankr. Reg. 46.

ance being upon the interest of the wife, child, or other person in his life, not the creditor's interest in his life, and the amount due representing and, beyond the amount of premiums paid, being the interest of the beneficiary.³⁷ But the rules stated above do not apply where the transaction is authorized and made lawful by a statute of exemption or by a statute permitting a debtor, as against his creditors, to pay premiums for insurance upon his life for the benefit of his wife and children, or other dependent relatives, except where such a statute expressly excepts from its provisions cases in which the premiums are paid with intent to defraud creditors.³⁸ Such statutes being in the

Colo.—Hendrie, etc., Mfg. Co. v. Platt, *supra*.

D. C.—Central Nat. Bank v. Hume, 3 Mackey, 360, *rev'd* on other grounds, 128 U. S. 195.

Ind.—Peace v. Makepeace, *supra*.

Miss.—Jones v. Patty, 73 Miss. 179, 18 So. 794.

Ohio.—Hoffman v. Kiefer, 10 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304.

Va.—Stigler v. Stigler, *supra*.

37. Aetna Nat. Bank v. U. S. Life Ins. Co., 24 Fed. 770.

38. *N. Y.*—Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474; Brummer v. Cohn, 86 N. Y. 11, 40 Am. Rep. 503, it need not appear from the terms of the policy or extrinsic evidence that it was the intention of the insured to avail himself of the provisions of the statute, nor need the policy provide for the disposition of the fund in case of the wife's death before the husband; Brick v. Campbell, 8 St. Rep. (N. Y.) 98.

U. S.—In re Jordan, 13 Fed. Cas. No. 7,511, 2 Hask. 362, under Maine statute; Smith v. Missouri Valley L. Ins. Co., 22 Fed. Cas. No. 13,083, 4 Dill. 353, under Missouri statute.

Ala.—Felrath v. Schonfield, 76 Ala. 199, 52 Am. Rep. 319.

Conn.—Continental L. Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530.

Ill.—Cole v. Marple, 98 Ill. 58, 38 Am. Rep. 83; Wagner v. Koch, 45 Ill. App. 501.

Ky.—Hise v. Hartford L. Ins. Co., 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358; Thompson v. Cundiff, 11 Bush. 567.

Md.—Elliott v. Bryan, 64 Md. 368, 1 Atl. 614.

Mo.—Judson v. Walker, 155 Mo. 166, 55 S. W. 1083; Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep. 497; Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328; Kiely v. Hiccox, 70 Mo. App. 617.

N. J.—Merchants', etc., Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272.

Ohio.—Weber v. Paxton, 48 Ohio St. 266, 26 N. E. 1051. Such a statute applies to a policy issued by a foreign insurance company as well as to one of those issued by domestic companies. Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160.

Pa.—Appeal of McCutcheon, 99 Pa. St. 133.

Tenn.—Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609,

nature of exemption laws are liberally construed by the courts in favor of those intended to be benefitted thereby.³⁹ Where

policy exempt by statute, although taken out by the husband before his marriage, and although payable to his legal representatives; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083.

Va.—*Mahoney v. James*, 94 Va. 176, 26 S. E. 384.

Eng.—*Holt v. Everall*, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. Rep. N. S. 599, 24 Wkly. Rep. 471.

Transactions covered by statute.—It has been held that a policy procured by a debtor in favor of one of his children only was not within the protection of a statute authorizing a married woman to cause the life of her husband to be insured for the benefit of herself and children, free from the claims of the representatives of the husband or any of his creditors. *Fearn v. Ward*, 65 Ala. 33, 80 Ala. 555, 2 So. 114. But a statute providing that it shall be lawful for any married woman, by herself and in her own name, or in the name of any third person as her trustee, to cause the life of her husband to be insured for her sole use, and exempting such insurance from the claims of the husband's representatives or creditors, contemplates and includes cases where the husband procures for his wife a policy on his own life. *Felrath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319; *Houston v. Maddux*, 179 Ill. 377, 53 N. E. 599.

An endowment policy has been held to be within such a statute. *Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503.

Premiums paid prior to the enactment of the statute are not

protected. *Thompson v. Cundiff*, 11 Bush. (Ky.) 567.

Death of wife before husband.

—See *Tompkins v. Levy*, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

Intent to defraud creditors.—

Under a statute permitting the insurance of a husband's life for his wife's sole use, and exempting such insurance from the claims of the husband's representatives or creditors, but providing that if the premium on such a policy is paid by any person "with intent to defraud his creditors," an amount of the insurance equal to the premiums so paid shall inure to the benefit of such creditors, it has been held that voluntary payment by a husband of the premiums on a policy in favor of his wife while he is insolvent, since it results in hindering, delaying or defrauding creditors, is fraudulent, within the meaning of the proviso, without reference to the motive or actual intention in making the payments. *Houston v. Maddux*, 179 Ill. 377, 53 N. E. 599. See also *Marmon v. Harwood*, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345; *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83; *Wagner v. Koch*, 45 Ill. App. 501; *Merchants', etc., Transp. Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272; *Union Cent. L. Ins. Co. v. Ohio Dec. (Reprint)* 528, 6 Am. L. Rec. 452. *Compare*, however, *Weber v. Paxton*, 48 Ohio St. 266, 26 N. E. 1051.

Under the Kentucky statute of 1870, which provides in substance that insurances made by husbands, whether insolvent or not, for the benefit of their wives and children, are

the debtor expends for insurance more than the statute authorizes, or where there is an intent to defraud his creditors, the latter, in some jurisdictions, may subject the insurance to the extent of such excess payments only.⁴⁰ In other jurisdictions,

valid as against creditors, unless the insurance is made with intent to defraud creditors, in which case the premiums paid shall be subject to their claims, it has been held that if the husband be insolvent and the amount of the insurance unreasonable, this will be sufficient evidence of fraud. *Hise v. Hartford L. Ins. Co.*, 90 Ky. 101, 13 S. W. 367, 11 Ky. L. Rep. 924, 29 Am. St. Rep. 358. See also *Morehead v. Mayfield*, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580; *Thompson v. Cundiff*, 11 Bush. (Ky.) 567.

Reservation of benefit to husband.—Where the husband takes out a policy of insurance on his own life, in favor of his wife, "her heirs, executors or assigns," paying the premiums with his own funds, a provision to the effect that, after the expiration of fifteen years, on surrender of the policy, none of its provisions having been violated, the company would pay to him, his heirs, executors or assigns, the equitable value of the policy, "as an endowment in cash," is the reservation of a benefit to himself, and renders the policy fraudulent as against his creditors. *Tompkins v. Levy*, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31.

Payment of premium by note of debtor.—It has been held that it is immaterial, so far as the claims of existing creditors are concerned, whether a debtor who takes out a policy of insurance on his life pays the premium in cash or executes his note therefor, since the fund to which

the creditors have a right to look for the payment of their claims may be diminished by the fraudulent creation of additional claims against it, as well as by the improper diversion of assets which constituted it. *Lehman v. Gunn*, 124 Ala. 213, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112.

39. *N. Y.*—*Brummer v. Cohn*, 86 N. Y. 11, 40 Am. Rep. 503.

Ala.—*Tompkins v. Levy*, 87 Ala. 263, 6 So. 346, 13 Am. St. Rep. 31; *Felrath v. Schonfield*, *supra*.

Ill.—*Houston v. Maddux*, *supra*; *Cole v. Marple*, *supra*; *Ramsey v. Nichols*, 73 Ill. App. 643.

Mo.—*Judson v. Walker*, *supra*; *Charter Oak L. Ins. Co. v. Brant*, *supra*.

Tenn.—*Rose v. Wortham*, *supra*.

40.—*N. Y.*—*Stokes v. Amerman*, 121 N. Y. 337, 24 N. E. 819; *Tuthill v. Goss*, 35 N. Y. Supp. 136.

U. S.—*Ingles v. New England Mut. L. Ins. Co.*, 27 Fed. 249, Massachusetts statute; *In re Jordan*, 13 Fed. Cas. No. 7,511, 2 Hask. 362, Maine statute. In a federal case it was held that where policies on the life of a husband were made for the benefit of his wife, but the premiums were paid "from the property of the husband in fraud of the rights of his creditors," his creditors could subject the insurance to the amount of the premiums so paid. Although this decision was made in New York, there was no reference in the opinion to the New York statute allowing insurance to a limited extent on the life of the husband for the benefit of his wife.

however, the creditors, may subject the entire insurance, or such proportion of the insurance as the excess of premiums paid bears to the total amount of premiums paid.⁴¹

§ 22. **Payment of premiums not voluntary or fraudulent.**—The premiums paid by an insolvent debtor for life insurance policies taken out in favor of his wife or for another's benefit, or the proceeds of such policy, are not, in the absence of fraudulent intent, liable for his debts and subject to the claims of creditors, where the payment of the premiums was not voluntary but based on adequate consideration, or the insurance was effected, or the policy was assigned, as security for, or in payment of, *bona fide* indebtedness due to the assignee or beneficiary of the policy.⁴² The proceeds of life insurance policies on the

Aetna Nat. Bank v. United States L. Ins. Co., 24 Fed. 770.

A quarterly premium not exceeding the statutory annual limitation, no other premium being paid, cannot be reached by creditors. In *re Jordan*, *supra*.

Membership in a benevolent association is life insurance within the meaning of the Illinois statute providing for recovery by creditors of an insolvent of life insurance premiums paid by such insolvent with intent to defraud his creditors. *Ramsey v. Nichols*, *supra*.

Excess premiums paid before contracting of debt.—Under the New York statute limiting the exemption of insurance policies on a husband's life from the claims of his creditors by declaring that where the amount of the annual premium paid out of the husband's funds or property exceeds a certain sum, the exemption shall not apply to such portions of the premiums as are in excess of the sums specified, it has been held that where the premiums so paid,

after the contracting of a debt by a husband, do not exceed the sum limited, the creditor can acquire no lien, although prior to the contracting of the debt premiums were so paid in excess of the statutory limitation. *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474.

A policy is not void because excessive premiums have been paid. *Smith v. Missouri Valley L. Ins. Co.*, *supra*.

41. *Stone v. Knickerbocker L. Ins. Co.*, 52 Ala. 589. Excess of insurance not assets of estate. *Jones v. Patty*, 73 Miss. 179, 18 So. 794. See *supra*, note 34.

42. *Fearn v. Ward*, 80 Ala. 555, 2 So. 114; *Hendric, etc., Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209, where the debtor was indebted to his wife in a sum more than sufficient for the payment of such premiums, and the insurance was affected under an express agreement with his wife to keep his life insured in an amount sufficient to repay such indebtedness, and to provide a fund for the sup-

life of a debtor, payable to or assigned to his wife or another, are not subject to the payment of his debts, where the premiums thereon were paid by the debtor while he was solvent and there was no intent to hinder, delay, or defraud his creditors.⁴³ And it has been held in some states that the proceeds of such a policy are not subject to the claims of the creditors of the debtor or assignor, where there is no fraudulent intent, merely because the debtor was insolvent at the time when the insurance was effected or the assignment was made.⁴⁴

§ 23. **Premiums not paid by debtor.**—Where premiums on insurance policies on the life of a debtor for the benefit of or assigned to his wife or another were not paid by the debtor but by his wife out of her separate estate or by another person, the proceeds thereof or premiums paid on such insurance cannot be reached and subjected by creditors of the debtor or assignor.⁴⁵ But since the right of existing creditors to proceed

port of herself and children after his death; *First Nat. Bank v. White*, 60 N. J. Eq. 487, 46 Atl. 1092, where the insured agreed to take out a life insurance policy in favor of his wife in consideration of being allowed the income from her estate during the life of the policy, and such income exceeded the amount of premium paid by him; *Sebring v. Brickley*, 7 Pa. Super. Ct. 198, 42 W. N. C. 189.

Assignment of policy in consideration of marriage.—Where an insolvent debtor assigned a policy of insurance on his life in consideration of the assignee's promise to marry him, which she subsequently did, and she took the assignment without notice of his insolvency and without knowledge of any intent on his part to defraud his creditors, it was held that she took a good title as a purchaser for a valuable consideration as against his creditors.

Provident L., etc., Co. v. Fidelity Ins., etc., Co., 203 Pa. St. 82, 52 Atl. 34.

43. *Foster v. Brown*, 65 Ind. 234; *Langford v. Freeman*, 60 Ind. 46; *King v. Cram*, 185 Mass. 103, 69 N. E. 1049; *First Nat. Bank v. Simpson*, 152 Mo. 638, 54 S. W. 506; *Trough's Estate*, 8 Phila. (Pa.) 214.

44. *McCutchoen's Appeal*, 99 Pa. St. 133; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *Weber v. Paxton*, 48 Ohio St. 266, 26 N. E. 1051.

45. *N. Y.*—*Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474, where no premium in excess of the statutory amount was paid by the debtor after the contracting of the plaintiff's debt.

U. S.—*In re Murrin*, 17 Fed. Cas. No. 9,968, 2 Dill. 120.

Ky.—*Stokes v. Coffey*, 8 Bush. 533.

Mo.—*First Nat. Bank v. Simpson*, *supra*.

against the fund arising from an insurance policy of their debtor arises upon the death of the debtor, their right cannot be affected by the fact that another person pays, after the death of the debtor, as an act of generosity to the beneficiaries named in the policy, the premium note given by the debtor.⁴⁶

§ 24. **Improvements, rents, and profits of real estate.**—Judgment creditors, with executions returned unsatisfied and their remedies at law exhausted, may by bill in chancery assail any fraudulent disposition of their debtor's real or personal property, and reach either legal or equitable assets of their debtor. Any beneficial interest of the debtor in real property, as well as in personal estate, rights which do not necessarily pertain to the absolute fee or ownership of real property but which grow out of such ownership, acquisitions which are the mere fruit and outgrowth of the property, may be thus reached and subjected by creditors.⁴⁷ Thus rents and profits may be recovered by a creditor from a fraudulent grantee of the debtor. The debtor can no more give away the rents and profits of his real estate than he can give away the real estate itself, and the fraudulent grantee has no more right, as against creditors of the grantor, to hold the former than he has to hold the latter.⁴⁸ But the grantee of lands by a fraudulent conveyance is not accountable to the creditors at large for the rents and profits prior to the time when a receiver is appointed,⁴⁹ nor is a trustee, under an assignment of land which is declared fraudulent at the suit of a creditor, bound to account for the rents received and in good

Ohio.—Jacob v. Continental L. Ins. Co., 1 Cinc. Super. Ct. 519.

Tenn.—Roberts v. Winton, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275.

Eng.—Holt v. Everall, *supra*.

46. Lehman v. Gunn, 124 Ala 213, 27 So. 475, 82 Am. St. Rep. 159, 51 L. R. A. 112.

47. Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, L. R. A. 250;

Farnham v. Campbell, 10 Paige (N. Y.) 598; Edward v. Entwisle, 2 Mackey (D. C.), 43; State v. McBride, 105 Mo. 265, 15 S. W. 72.

48. Loos v. Wilkinson, *supra*; Marshall v. Croom, 60 Ala. 121; Kipp v. Hanna, 2 Bland (Md.) 26. See also Rents, issues and profits, chap. XIV, § 38, *infra*.

49. Robinson v. Stewart, 10 N. Y. 189.

faith applied, according to the terms of the trust, before the commencement of the suit, or the attaching of any specific lien upon the lands.⁵⁰ Improvements placed by a debtor upon the real property of another, whether his wife, child, or other third person, acting in concert or collusion with him to defraud creditors, or money or property of a debtor expended in improvements upon the real property of any such person, without consideration and with intent to defraud creditors, the owner of the property participating in and having knowledge of such intent, can be followed, and the real estate, or the rents or profits thereof, charged in favor of creditors with the value of such improvements, and creditors can reach and subject the real estate, or the rents and profits, to the satisfaction of their claims to the extent of the value of such improvements.⁵¹ The rule does not apply, however, as to subsequent creditors in the absence of an intent to defraud them participated in by or known to the

50. *Collumb v. Read*, 24 N. Y. 505.

51. *N. Y.—Isham v. Schafer*, 60 Barb. 317, "where no debt has been created between the parties to the fraudulent transaction, and the personal property of the judgment debtor has merged in and become part of the real estate of another in this way, the appropriate, if not the only remedy is to fasten the judgment upon the real estate to the extent of the judgment debtor's property thus made part of the realty;" *Bachs v. Tomlinson*, 1 St. Rep. (N. Y.) 484.

Ala.—Ware v. Seasingood, 92 Ala. 152, 9 So. 138.

Ill.—Dietz v. Atwood, 19 Ill. App. 96.

Ind.—Blair v. Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; *Moore v. Lampton*, 80 Ind. 301.

Ky.—Brooks-Waterfield Co. v. Frisbie, 99 Ky. 125, 35 S. W. 106, 59 Am. St. Rep. 452; *Heck v. Fisher*, 78

Ky. 643; *Athey v. Knotts*, 6 B. Mon. 24.

Me.—Trefethen v. Lynam, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190.

Mass.—Lynde v. McGregor, 13 Allen, 182, 90 Am. Dec. 188, the amount of the increase in value, for which no consideration has been paid by a wife, and which has been added to her estate by the husband in fraud of his creditors, in equity belongs to them, and may be made a charge upon the land for their benefit.

Minn.—Christian v. Klein, 77 Minn. 116, 79 N. W. 602.

Mo.—Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 376.

N. H.—Caswell v. Hill, 47 N. H. 407.

Pa.—Peoples Nat. Bank v. Loeffert, 184 Pa. St. 164, 38 Atl. 996.

W. Va.—Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410; *Burt v.*

owner of the property.⁵² Temporary or perishable improvements which do not add to the permanent value of the land, cannot be reached.⁵³

§ 25. **Crops, ores, and other products of the land.**—Where a conveyance of land is fraudulent and void as to creditors, the growing crops on the lands so fraudulently conveyed are subject to execution in favor of the grantor's creditors and may be reached and subjected by creditors of the grantor.⁵⁴ The same rule applies to ores and similar products of the land.⁵⁵ A judgment creditor is also entitled to resort to crops growing upon the land of his debtor after its conveyance in fraud of creditors, so far at least as the fraudulent grantor retains an interest in them by an understanding with the grantee,⁵⁶ notwithstanding

Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Rose v. Brown, 11 W. Va. 122. See also Vandervoort v. Fouse, 52 W. Va. 214, 43 S. E. 112.

Contra.—Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632; White v. Hildreth, 32 Vt. 265.

52. Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; Robinson v. Huffman, 15 Mon. (Ky.) 80, 61 Am. Dec. 177; Caswell v. Hill, 47 N. H. 407.

53. Dick v. Hamilton, 1 Deady (U. S.) 322.

54. Dodd v. Adams, 125 Mass. 398, hay cut on such land is subject to execution to satisfy a debt of the grantor contracted subsequent to the conveyance; Pierce v. Hill, 35 Mich. 194, 24 Am. Rep. 541, and it is not necessary to have the conveyance set aside in a direct proceeding for that purpose; Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699, growing crops subject to levy, upon exempt land, may be so levied upon, although as between the grantor and grantee they pass with the land; Merchants',

etc., Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108; Stehdsman v. Huber, 21 Pa. St. 260.

55. State, Mastin v. McBride, 105 Mo. 265, 15 S. W. 72, 32 Am. & Eng. Corp. Cas. 616, ores taken out by the purchaser at a trustee's sale of lands of a mining company are subject to execution against the company, where the purchaser is a mere figurehead and nominal purchaser assisting the company to defraud its creditors.

56. Fury v. Strohecker, 44 Mich. 337, 6 N. W. 834, and where there is reason to suppose that collusion exists all doubts should be solved in the creditor's favor.

Crops on land purchased in wife's name by an insolvent debtor, with the intention of paying therefor by his labor and skill, and the proceeds of the property, are subject to the payment of his debts. Turner-Looker Co. v. Garvey, 19 Ky. L. Rep. 1205, 43 S. W. 202.

Crops severed and gathered by a grantor, who is left in possession of the property by the laches

such crops had not been sown at the time of the fraudulent conveyance.⁵⁷ But if the fraudulent grantee enters into possession, and cultivates the land upon his own account, the creditors of the grantor cannot attach the annual crops. They can only attach and levy upon what their debtor owns and fraudulently conveyed.⁵⁸ They cannot seize the products of the land, produced by the industry of the grantee, as the goods of the grantor; as, for example, gypsum or plaster, where the rock was dug from the soil by the grantee and made into plaster at his own expense.⁵⁹ An absolute conveyance intended as a mortgage, whereby a debtor conveys to one of his creditors all crops to be raised by him during succeeding years on the mortgaged premises, of which he maintains possession, is void as to other creditors of the mortgagor, whether prior or subsequent to its date or to the time when a crop is raised, unless before their rights attach thereto the property is delivered to the mortgagee, or a subsequent act necessary to make it valid is performed.⁶⁰ But a sale by a landlord of his rental interest in growing crops on the land leased is valid as against his creditors, where it is made in good faith and for a valuable consideration, and with the intention of a present vesting of title.⁶¹ The *bona fides* of a purported sale of an immatured crop, and the question of title to the property, may be, however, for the determination of the jury under certain circumstances.⁶² Where a fraudulent conveyance

of the grantee, are subject to attachment against the grantor. Wolcott v. Hamilton, 61 Vt. 79, 17 Atl. 39.

57. Fury v. Strohecker, *supra*. But see Jones v. Bryant, 13 N. H. 53.

58. Jones v. Bryant, 13 N. H. 53; Kilbride v. Cameron, 17 U. C. C. P. 373.

59. Garbutt v. Smith, 40 Barb. (N. Y.) 22, a creditor cannot thus attack an alleged fraudulent conveyance collaterally.

60. Merchants', etc., Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108.

61. Hood v. Gibson, 8 Kan. App. 588, 56 Pac. 148.

62. Haines v. McKinnon, 35 Oreg. 573, 57 Pac. 903, where there was an apparent ambiguity in the purported bill of sale, arising from a provision requiring the grain to be delivered at the vendee's warehouse at the time of threshing, and the latter testified that he bought the property at the time the bill of sale was executed, and that, although the property was to be so delivered to him, it was understood between the

of a farm has been made, the grantee has the title to the crops, as against the creditors of the grantor, until the conveyance is impeached, unless he acts as agent of the grantor,⁶³ and is entitled, so long as the conveyance is not set aside, to the crops which he raises on the land for his own benefit.⁶⁴

§ 26. **Equitable estates, rights, and interests.**—The transfer by a debtor of any equitable estate, right or interest in property, not subject to be levied on at law, without consideration or with intent to hinder, delay, or defraud his creditors, is voidable at the election of existing and subsequent creditors, and such estate, right, or interest may be reached and subjected by creditors, in equity, in the hands of the fraudulent transferee.⁶⁵ By statute, in some jurisdictions, such interests may be reached even at law.⁶⁶ A debtor, however, may sell his equitable interest in property, if it be done without fraud, before a bill is

parties that the title had already passed.

63. *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815.

64. *Cain v. Mead*, 66 Minn. 195, 68 N. W. 840.

65. *N. Y.*—*Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

U. S.—*Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Sanford v. Lackland*, 21 Fed. Cas. No. 12,312, 2 Dill. 6, if property was given to trustees to hold for A. until he reached a certain age, when it was to be paid over to him, and A. became bankrupt before he arrived at that age, his assignee in bankruptcy was entitled to the property.

N. C.—*Frost v. Reynolds*, 39 N. C. 494.

Pa.—*Mackason's Appeal*, 42 Pa. St. 330, 82 Am. Dec. 517, one *sui juris* cannot, as against creditors, either prior or subsequent, settle his

property, in trust for his own use for life, and over to his appointees by will, and, in default of such appointment, to the use of his lawful heirs-in-fee; property so settled is assets in the hands of the trustees for the payment of debts, whether contracted prior or subsequent to the execution of the deed of trust.

S. C.—*McNair v. Moore*, 64 S. C. 82, 41 S. E. 829, where a debtor transferred his equitable interest in land to his wife without consideration, and she paid the balance of the purchase money and took the legal title, the conveyance was fraudulent as to her husband's creditors to the extent the transfer was above the homestead exemption.

Tenn.—*Planters' Bank v. Henderson*, H. Humphr. 75.

Eng.—*Barston v. Vanheythuysen*, 11 Hare, 126, 45 Eng. Ch. 127, 18 Jur. 344, 1 Wkly. Rep. 429.

66. See Remedies, chap. XV, *infra*.

filed by a creditor to enforce the payment of his judgment out of such equitable interest.⁶⁷ It is a settled rule of law that the beneficial interest of a *cestui que trust*, whatever it may be, is liable in equity for the payment of his debts.⁶⁸ This rule applies to the interest of a *cestui que trust* in the income of a trust estate or fund.⁶⁹ In some jurisdictions, by statutory provisions, the surplus income of a trust estate belonging to a debtor, beyond what is necessary for the suitable education, support, and maintenance of the *cestui que trust* and those dependent upon him, is liable in equity to the claims of creditors, whether the trust is created to receive and pay over the rents and profits of land or the income of personal property.⁷⁰ But where an equitable interest or fund held in trust has proceeded from some person other than the *cestui que trust*, and the founder of the trust has secured the enjoyment of it to the object of his bounty, by some valid provision in the deed, will, or other instrument creating the trust that it shall not be alienable by him, or be subject to be taken by his creditors, the interest of the *cestui que trust* in the property or the income thereof is rendered inalienable and cannot be charged for his debts or reached in equity by his creditors.⁷¹

67. *Russell v. Houston*, 5 Ind. 180.

68. *Nichols v. Levy*, 5 Wall. (U. S.) 433, 441, 18 L. Ed. 596, "it cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors."

69. *Sparhawk v. Cloon*, 125 Mass. 263, this quality is so inseparable from the estate, that no provision, however express, which does not operate as a cesser, or limitation of the estate itself, can protect it from his debts.

70. *Wetmore v. Wetmore*, 149 N.

Y. 529, 44 N. E. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708; *Tolles v. Wood*, 99 N. Y. 616, 1 N. E. 251; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Sillick v. Mason*, 2 Barb. Ch. 79; *Hardenburgh v. Blair*, 30 N. J. Eq. 645.

71. *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512; *Hyde v. Woods*, 194 U. S. 523; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Spindle v. Shreve*, 4 Fed. 136, 9 Biss. 199; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Arnwine v. Carroll*, 8 N. J. Eq.

§ 27. **Equity of redemption.**—An equity of redemption in lands or chattels mortgaged is an equitable right which may be reached by creditors in equity,⁷² if it have any value.⁷³ It has been held that the court will not enter into any nice calculation of the absolute value of the right so reserved, and that such equity in lands mortgaged to their full value is a valuable right, which may be reached by creditors.⁷⁴ But an equity of redemption in an exempt homestead cannot be thus reached by creditors.⁷⁵

§ 28. **Interest under contract of purchase.**—An assignment of a debtor's interest, by virtue of a contract for the conveyance of land, which assignment is made and received for the purpose of defrauding the creditors of the assignor, is void against subsequent creditors, as well as those whose debts were contracted prior to the assignment, and may be reached in equity and subjected by creditors to the satisfaction of their debts.⁷⁶

§ 29. **Property purchased in name of third person.**—Where a debtor purchases or advances the purchase money of land, and the conveyance is made to another, for example, to his wife, child, or other third person, the law impresses a trust upon the land, in favor of the creditors of the debtor, which may be en-

620; *Rife v. Geyer*, 95 Pa. St. 393; *Brown v. Williams*, 36 Pa. St. 338; *Holdship v. Patterson*, 7 Watts (Pa.), 542; *White v. White*, 30 Vt. 338; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405.

72. *Campbell v. Fish*, 8 Daly (N. Y.), 162; *Watson v. Bonfils*, 116 Fed. 157, 33 C. C. A. 535; *Johnson v. Burnside*, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74; *Fleury v. Pringle*, 26 Grant Ch. (U. C.) 67. Compare *Potter v. Skiles*, 114 Ky. 132, 70 S. W. 301, 71 S. W. 627, 24 Ky. L. Rep. 910, 1457, under Kentucky statute. See *Chautauqua*

County Bank v. Risley, 19 N. Y. 369.

73. See chap. IV, § 4, *supra*.

74. *Sims v. Gaines*, 64 Ala. 392.

75. *Winter v. Ritchie*, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331. See also *Homestead*, chap. IV, § 42, *infra*.

76. *Whitmore v. Woodward*, 28 Me. 392; *Frost v. Reynolds*, 39 N. C. (4 Ired. Eq.) 494, after payment of the purchase price; *McNair v. Moore*, 64 S. C. 82, 41 S. E. 829; *Barton v. Vanheythuysen*, 11 Hare, 126, 45 Eng. Ch. 127, 18 Jur. 344, 1 Wkly. Rep. 429.

forced in a court of equity.⁷⁷ Personal property purchased by a debtor with his own money and for his own benefit, although the bill of sale is made to a third person, can be reached by the debtor's creditors.⁷⁸

§ 30. **Reservations by debtor.**—Any provision in a transfer of property by a person indebted at the time whereby he reserves or secures a personal benefit to himself or family, at the expense of his creditors, may be avoided by his creditors and the property reached by them.⁷⁹ A debtor cannot place his property

77. *N. Y.*—*McCartney v. Bostwick*, 32 N. Y. 53, 31 Barb. 390; *Wood v. Robinson*, 22 N. Y. 564; *Donovan v. Sheridan*, 5 J. & Sp. 256.

Colo.—*Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850.

Del.—*Newell v. Morgan*, 2 Harr. 225.

Ga.—*Field v. Jones*, 10 Ga. 229.

Ind.—*Demaree v. Driskill*, 3 Blackf. 115; *Kipper v. Glancey*, 2 Blackf. 356.

Ky.—*McLeod's Trustee v. McLeod*, 28 Ky. L. Rep. 284, 667, 89 S. W. 199, 90 S. W. 5; *Mathews v. Arbitton*, 83 Ky. 32; *Doyle v. Sleeper*, 1 Dana, 531.

Me.—*Augusta Savings Bank v. Crossman*, 7 Atl. 396; *Gray v. Chase*, 57 Me. 558.

Md.—*Trego v. Skinner*, 42 Md. 426.

Mass.—*Bresnihan v. Sheehan*, 125 Mass. 11.

Minn.—*Sumner v. Sawtelle*, 8 Minn. 309.

Miss.—*Simmons v. Ingram*, 60 Miss. 886; *Bernheim v. Beer*, 56 Miss. 149.

Mo.—*Gutzwiller v. Lackman*, 23 Mo. 168.

Neb.—*Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152.

N. J.—*Haggerty v. Nixon*, 26 N. J. Eq. 42.

N. C.—*Gentry v. Harper*, 55 N. C. 177.

S. C.—*Godbold v. Lambert*, 8 Rich. Eq. 155, 70 Am. Dec. 192.

Tenn.—*Goff v. Dabbs*, 4 Baxt. 300.

Vt.—*Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976; *Waterman v. Cochran*, 12 Vt. 699.

W. Va.—*Lockhard v. Beckley*, 10 W. Va. 87.

Can.—*O'Doherty v. Ontario Bank*, 32 U. C. C. P. 285.

Eng.—*Barton v. Vanheythuyssen*, 11 Hare, 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127.

See also Purchase of property in name of third person, chap. II, § 5, *supra*.

78. *Godding v. Brackett*, 34 Me. 27, although the debtor pretended to buy for and the seller supposed he was selling to such third person.

79. *N. Y.*—*Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395, *aff'g* 25 App. Div. (N. Y.) 153, 49 N. Y. Supp. 222; *Young v. Hearmans*, 66 N. Y. 374; *Elias v. Farley*, 2 Abb. Dec. 11, 3 Keyes 398, 2 Transcr. App. 116, 5 Abb. Pr. N. S. 39; *Harris v. Buchner*, 35 App. Div.

in trust, with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put his life interest beyond the reach of his creditors. The entire reserved interest is a fund to which his creditors can resort.⁸⁰ A conveyance in consideration of an agreement to furnish a suitable home and support to the grantor during his natural life, amounts to a mere gift, with agreement back for life support, and is not effectual if made to defraud creditors.⁸¹

§ 31. Property conveyed by debtor to equitable owner.—

Where no question of estoppel is involved, a conveyance by a debtor who holds property in trust, or holds the bare legal title to property for another but has no beneficial interest therein, is not fraudulent as against his creditors, when made by the debtor to the equitable owner or one already having the beneficial title to the property, or to a third person at the request of the equitable owner, and the property so conveyed cannot be reached in equity and subjected to the payment of the debts of the debtor or grantor.⁸² The rule applies where property purchased by or

(N. Y.) 594, 55 N. Y. Supp. 172; Todd v. Monell, 19 Hun, 362.

U. S.—De Hierapolis v. Lawrence, 115 Fed. 761.

N. C.—Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737.

Pa.—Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517.

See also Reservations and trusts for grantor, chap. X, *infra*.

80. Schenck v. Barnes, *supra*, but where the property is held in trust for a debtor and the fund proceeds from a third party, the creditor can only reach the surplus income, after providing for the proper support of the *cestui que trust*; Williams v. Thorn, 70 N. Y. 270; Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Raymond v. Harris, 84 App. Div. (N. Y.) 546, 82 N. Y. Supp. 689; Mack-

ason's Appeal, *supra*. And see Reservations and trusts for grantor, chap. X, *infra*.

81. Bowlus v. Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167. See Cloud v. Malvin, 108 Iowa, 52; Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737. See also Support or care of grantor and family, chap. X, § 7, *infra*; Future support of grantor, chap. X, § 20, *infra*.

82. N. Y.—First Nat. Bank of Amsterdam v. Miller, 24 App. Div. (N. Y.) 551, 49 N. Y. Supp. 981, *rev'd* on other grounds in 163 N. Y. 164, 57 N. E. 308, a trustee of a fund for the support of himself and family during life, at his death the residue to go to his children, has no personal interest in the fund which his creditors can reach, and his as-

belonging to one person is conveyed to another by mistake, the legal title thus conveyed to the one being held in trust for the other. The subsequent conveyance by the one thus holding the legal title to the equitable owner is not fraudulent as against

signment thereof to his children cannot be questioned by them.

U. S.—Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955.

Conn.—Jarvis v. Prentice, 19 Conn. 272.

Ill.—Seeders v. Allen, 98 Ill. 468.

Ind.—Bremmerman v. Jennings, 101 Ind. 253; Robertson v. Huffman, 92 Ind. 247.

Iowa.—McGregor Bank v. Hostetter, 61 Iowa, 395, 16 N. W. 289; Cottrell v. Smith, 63 Iowa, 181, a conveyance made in consideration of a moral obligation will not be set aside at the instance of a creditor whose judgment was not a lien on the land when the conveyance was made.

Ky.—Clark v. Rucker, 7 B. Mon. 583; Mandy v. Mason, 4 Bush. 339.

Me.—First Nat. Bank v. Dwelley, 72 Me. 223, where the debtor received the title for the specific purpose of conveying it to another; Carter v. Porter, 55 Me. 337.

Mich.—Victor Sewing Mach. Co. v. Jacobs, 46 Mich. 494, 9 N. W. 532.

Miss.—Gallman v. Perrie, 47 Miss. 131, where one purchased land for another through an agent, in whose name as trustee title was taken, a conveyance of the land by the trustee to the beneficiary originally intended, when judgment was about to be rendered against the trustee, was not fraudulent as to the trustee's creditor.

Mo.—Perkins v. Meighan, 147 Mo. 617, 49 S. W. 498, 71 Am. St. Rep. 586; Dermott v. Carter, 109 Mo. 21, 18 S. W. 1121; Caffee v. Smith, 101

Mo. 229, 13 S. W. 1050; Erwin v. Holderman, 92 Mo. 333, 5 S. W. 36.

Nev.—Stanton v. Crane, 25 Nev. 114, 58 Pac. 53.

N. J.—Carver v. Todd, 48 N. J. Eq. 102, 28 Atl. 943, 27 Am. St. Rep. 466, a conveyance of trust property by the trustee to the beneficiary is not fraudulent as to the creditors of the trustee, though their debts accrued before the conveyance was made.

N. C.—Buie v. Kelly, 27 N. C. 169; Runyon v. Leary, 20 N. C. 373.

Pa.—Brown v. Williamson, 36 Pa. St. 338; Bancord v. Kuhn, 36 Pa. St. 383; Holdship v. Patterson, 7 Watts, 547; Ashurst v. Given, 5 Watts & S. 323.

Tenn.—Allen v. Holland, 3 Yerg. 343.

Tex.—Bicocchi v. Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875.

Vt.—White v. White, 30 Vt. 338.

Wash.—Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509.

Eng.—Middleton v. Pollock, 45 L. J. Ch. 293, 2 Ch. Div. 104; Houghton v. Tait, 3 Y. & J. 436.

See also Moral obligation as consideration, chap. VIII, § 6, *infra*; Conveyance in execution of prior agreement, chap. VIII, § 24, *infra*.

A reconveyance of land by a debtor, to whom it had been conveyed for the purpose of qualifying him to vote at a public election, is not void under the statute. Jackson v. Ham, 15 Johns. 261.

The retransfer of bank stock by a debtor, to whom it had been

the creditors of the former.⁸³ If the conveyance by a debtor includes property of the debtor, as, for example, where a judgment debtor conveys lands held in trust, upon which he has erected a building of his own, to one designated by the *cestui que trust*, the conveyance, as against judgment creditors, is fraudulent *pro tanto*, that is to say, it is valid as to the land, but fraudulent and void as to the improvements made thereon by the debtor.⁸⁴

§ 32. **Conveyance in pursuance of parol trust.**—Where the consideration for real or personal property is paid by one person and the deed or title to the property is taken in the name of another, and the latter, in recognition of an express parol trust or agreement to hold the property in trust for the former and upon request to convey the property to the former, conveys the property or makes a declaration of trust in accordance with the parol trust or agreement, in the absence of any question of estoppel, the creditors of the latter cannot assail and set aside the conveyance as in fraud of creditors and subject the property to the payment of their claims.⁸⁵ The equitable duty rest-

transferred to enable him to qualify as a director in a bank, although without consideration, is valid, and protects the stock from garnishment by a creditor of the debtor. *Citizens' Nat. Bank v. Sturgis Nat. Bank* (Tex. Civ. App.), 81 S. W. 550.

83. *Fairhurst v. Lewis*, 23 Ark. 435, deed of land purchased by a son executed to his father by mistake; *Petit v. Hubbell*, 105 Mich. 405, 63 N. W. 407, where land belonging to a principal has been conveyed to his agent by mistake.

84. *Bachs v. Tomlinson*, 1 St. Rep. (N. Y.) 484.

85. *N. Y.*—*Dunn v. Whalen*, 21 N. Y. Supp. 869; *Holden v. Burnham*, 2 Hun, 678, 63 N. Y. 74; *Davis v. Graves*, 29 Barb. 480.

U. S.—*Moore v. Crawford*, 130 U. S. 122, 32 L. Ed. 878; *Mills v. Scott*, 43 Fed. 452.

Ind.—*Hayes v. Reger*, 102 Ind. 524, 1 N. E. 386.

Iowa.—*De Vore v. Jones*, 82 Iowa, 66, 47 N. W. 885; *Caffal v. Hale*, 49 Iowa, 53.

Mich.—*Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877, 4 Det. L. N. 356.

Mo.—*DeBerry v. Wheeler*, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538; *Aultman v. Booth*, 95 Mo. 383, 8 S. W. 742.

Neb.—*Cresswell v. McCaig*, 11 Neb. 222, 9 N. W. 52.

N. J.—*Iauch v. De Socarras*, 56 N. J. Eq. 538, 39 Atl. 211; *Pitney v. Bolton*, 45 N. J. Eq. 639, 18 Atl. 211;

ing on the latter is sufficient consideration for the transfer.⁸⁶ But where the circumstances are such that the debtor cannot be regarded as an equitable trustee, the conveyance is invalid.⁸⁷

§ 33. **Conveyance by husband to or for wife.**—In the absence of actual fraud or circumstances establishing an estoppel, where the legal title to property purchased with the means of the wife or with her separate estate is in the husband, and he conveys it to his wife, directly or through a third person, the conveyance is valid as against the creditors of the husband and the property cannot be reached in equity, and subjected to the satisfaction of their claims.⁸⁸ And where he exchanges it for other

Jamison v. Miller, 27 N. J. Eq. 586.

N. C.—*Brisco v. Norris*, 112 N. C. 671, 16 S. E. 850.

Or.—*Richmond v. Bloch*, 36 Or. 590, 60 Pac. 385.

Pa.—*Sackett v. Spencer*, 65 Pa. 89.

Tex.—*Citizens' Nat. Bank v. Sturgis Nat. Bank* (Civ. App.), 81 S. W. 550.

Eng.—*Gardner v. Rowe*, 3 L. J. Ch. O. S. 220, 2 Sim. & St. 346, 25 Rev. Rep. 214, 1 Eng. Ch. 346, 57 Eng. Reprint, 378, *aff'd* 7 L. J. Ch. O. S. 2, 5 Russ. 258, 5 Eng. Ch. 258, 38 Eng. Reprint, 1024.

But see *Smith v. Lane*, 3 Pick. (Mass.) 205, where a husband conveyed his life estate in his wife's lands to her father, who, being insolvent, afterwards conveyed it to the wife, to avoid it being taken by creditors, the conveyance to the wife was fraudulent as against creditors, and could not be rendered valid by parol evidence showing the first conveyance to have been made in trust for her benefit.

86. *Davis v. Graves*, 29 Barb. (N. Y.) 480.

87. *Champlin v. Seeber*, 56 How.

Pr. (N. Y.) 46, where land voluntarily conveyed by a mother to her daughter was inherited by the mother from her intestate father, but it was claimed that the conveyance was, in pursuance of his request to the mother shortly before his death, assented to by her.

88. *N. Y.*—*Syracuse Chilled Plow Co. v. Wing*, 85 N. Y. 421; *Holden v. Burnham*, 5 Thomp. & C. 195; *Baldwin v. Ryan*, 3 Thomp. & C. 251; *Wickes v. Clark*, 3 Edw. Ch. 58.

U. S.—*Voorheis v. Blanton*, 89 Fed. 885, 32 C. C. A. 384, 83 Fed. 234.

Fla.—*Hill v. Meinhard*, 39 Fla. 111, 21 So. 805.

Ga.—*Rutherford v. Chapman*, 59 Ga. 177.

Ill.—*Phillips v. North*, 77 Ill. 243; *McLaurie v. Partlow*, 53 Ill. 340; *Torrey v. Dickinson*, 111 Ill. App. 524; *Fleming v. Magley*, 32 Ill. App. 183.

Ind.—*Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907; *Lord v. Bishop*, 101 Ind. 334; *Heaton v. White*, 85 Ind. 376; *Leonard v. Barnett*, 70 Ind. 367; *Eagan v. Downing*, 55 Ind. 65; *Summers v. Hoover*, 42

property, and has the deeds of the latter made to her, equity will uphold her title as against creditors not misled by the title standing in him.⁸⁹ The right of the wife as against her husband's creditors may be determined by laches in asserting her right, although the conveyance may have been taken in her husband's name by mistake.⁹⁰ The title to property purchased in his own name during coverture by one who has reduced his wife's personal property to possession, in a state where the title to such property rests by law in the husband when reduced to his

Ind. 153; *Simms v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

Iowa.—*Devore v. Jones*, 82 Iowa, 66, 47 N. W. 885; *Payne v. Wilson*, 76 Iowa, 377, 41 N. W. 45.

Ky.—*Campbell v. Campbell*, 79 Ky. 395.

Md.—*Hinman v. Silcox*, 91 Md. 576, 46 Atl. 1017.

Mass.—*Bancroft v. Curtis*, 108 Mass. 47; *Stetson v. O'Sullivan*, 90 Mass. 321.

Minn.—*Farnham v. Kennedy*, 28 Minn. 365, 10 N. W. 20.

Miss.—*Citizens' Mut. Ins. Co. v. Foster*, 64 Miss. 288, 1 So. 238.

Mo.—*Cooper v. Standley*, 40 Mo. App. 138; *Bangert v. Bangert*, 13 Mo. App. 144.

Neb.—*Jayne v. Hymer*, 66 Neb. 785, 92 N. W. 1019, where property conveyed to the wife was conveyed in payment of money advanced by her to her husband, the proceeds of which had been used in the purchase of her property, which was the consideration of the conveyance; *Hews v. Kenney*, 43 Neb. 815, 62 N. W. 204; *Goldsmith v. Fuller*, 30 Neb. 563, 46 N. W. 712.

N. J.—*Dresser v. Zabriskie*, 39 Atl. 1066; *Beck v. Schultz*, 32 Atl. 695; *Providence City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158.

N. C.—*Brisco v. Norris*, 112 N. C. 671, 16 S. E. 850.

Pa.—*Heath v. Slocum*, 115 Pa. St. 549, 9 Atl. 259.

Tenn.—*Rosenbaum v. Davis* (Ch. App.), 48 S. W. 706; *Wilkinson v. Wilkinson*, 1 Head. 305.

Tex.—*Matador Land, etc., Co. v. Cooper* (Civ. App. 1905), 87 S. W. 235; *Citizens' Nat. Bank v. Sturgis Nat. Bank* (Civ. App.), 81 S. W. 550; *McKamey v. Thorp*, 61 Tex. 648; *Aultman v. George*, 12 Tex. Civ. App. 457, 34 S. W. 652.

Va.—*Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

Wash.—*Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100.

W. Va.—*Prim v. McIntosh*, 44 W. Va. 790, 28 S. E. 742; *Hamilton v. Steele*, 22 W. Va. 348; *McGinnis v. Curry*, 13 W. Va. 29, but a conveyance will not be sustained where the property had been given by the wife to the husband.

Wis.—*Marsten v. Dresen*, 85 Wis. 530, 55 N. W. 896.

See Appropriation of wife's estate, chap. VIII, § 48, *infra*; Laches of wife in asserting claim, chap. VIII, § 52, *infra*.

⁸⁹ *Sweeney v. Damron*, 47 Ill. 450.

⁹⁰ *Hinman v. Silcox*, 91 Md. 576, 46 Atl. 1017.

possession, is not affected with any implied trust in favor of the wife; and a subsequent conveyance of the property so purchased by him to his wife in consideration of a supposed implied trust will be treated as a voluntary conveyance, or post-nuptial settlement.⁹¹ A husband has a right to decline to assert absolutely his marital rights to the personal property of his wife, and the equitable right of a wife to a settlement of her separate estate, not reduced to possession by her husband, is a consideration sufficiently valuable to support, as against creditors, a deed to her or in trust to her from her husband, relinquishing such estate for her sole and separate use.⁹² And where money is received by a husband as his wife's and to be accounted for or secured by him to her, he waiving his marital rights thereto, she has an equitable right to the fund sufficient to sustain a conveyance or mortgage which he subsequently gave to re-imburse or secure her.⁹³ But in order to support a conveyance to the wife, by the husband, on the ground of a previous application of her separate property to his use, it must appear that the advances were made by her on the faith of the anticipated conveyance, and that the conveyance had reference to the previous advances by the wife.⁹⁴

91. *American Freehold Land, etc., Co. v. Maxwell*, 39 Fla. 489, 22 So. 751, *citing* *Coleman v. Burr*, 92 N. Y. 17, 45 Am. Rep. 160; *Boulton v. Hahn*, 58 Iowa, 518; *Meredith v. Citizens' Nat. Bank*, 92 Ind. 343; *Bolling v. Jones*, 67 Ala. 508; *Joiner v. Franklin*, 12 Lea (Tenn.), 420; *Hart v. Leete*, 104 Mo. 315; *Super v. Chandler*, 36 S. C. 344; *Clarke v. King*, 34 W. Va. 631. See also Husband's curtesy or other interest in wife's property, chap. IV, § 37, *infra*.

92. *U. S.*—*Gallego v. Chevallie*, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

Ala.—*Bradford v. Goldsborough*, 15 Ala. 311.

Ky.—*McClanahan v. Beasley*, 17 B. Mon. 111; *McCauley v. Rodes*, 7 B.

Mon. 462; *Hurd v. Courtenay*, 5 Metc. 139.

Mass.—*Gassett v. Grout*, 4 Metc. 486.

Eng.—*White v. Sansom*, 3 Atk. 410, 26 Eng. Reprint, 1037; *Moore v. Rycault*, Prec. Ch. 22, 24 Eng. Reprint, 12; *Turnley v. Hooper*, 3 Smale & G. 349; *In re Home*, 54 L. T. Rep. N. S. 301; *Dundas v. Dutens*, 2 Cox. Ch. 235, 30 Eng. Reprint, 109, 1 Ves. Jr. 196, 30 Eng. Reprint, 298, 1 Rev. Rep. 112.

93. *Syracuse Chilled Plow Co. v. Wing*, 85 N. Y. 421; *Jaycox v. Caldwell*, 51 N. Y. 395; *Ellis v. Myers*, 4 Silv. (N. Y.) 323, 8 N. Y. Supp. 139.

94. *Wickes v. Clarke*, 3 Edw. Ch. (N. Y.) 58.

§ 34. **Reconveyance by fraudulent grantee.**—A court of equity will afford no relief to a debtor who has transferred his property for the purpose of defrauding his creditors, and who subsequently seeks, as against the transferees, to recover back the same.⁹⁵ Such a conveyance vests the title to the property transferred in the fraudulent grantee,⁹⁶ and the property in his hands is subject to a lien as against him and to the claims of his creditors, the same as his other property.⁹⁷ But where the grantee of a conveyance made to defraud creditors without consideration reconveys the property to his grantor, or a fraudulent assignee accounts for and pays over to the debtor the proceeds of the property assigned, before any creditor obtains a lien thereon, the reconveyance is valid as against his creditors and he is discharged from liability to them. A creditor at large is not within the protection of the statute in relation to fraudulent conveyances, and the grantee's creditors, who have no lien, cannot attack the conveyance as fraudulent as to them.⁹⁸ In some jurisdictions, however, the rule is maintained that a reconveyance by a fraudulent grantee or assignee, who is in failing cir-

95. See Right to recover property fraudulently conveyed, chap. XIV, § 8, *infra*.

96. See Property rights, chap. XIV, § 4, *infra*.

97. See Rights of creditors of grantee, chap. XIV, § 23, *infra*.

98. *N. Y.*—Cramer v. Blood, 48 N. Y. 684; Davis v. Graves, 29 Barb. 480; Jackson v. Ham, 15 Johns. 261.

Ind.—Lafayette Bank v. Brady, 96 Ind. 498.

Iowa.—Davidson v. Dwyer, 62 Iowa, 332, 17 N. W. 575; First Nat. Bank v. Hostetter, 61 Iowa, 395, 16 N. W. 289.

Ky.—Clark v. Rucker, 7 B. Mon. 583.

Me.—Matthews v. Buck, 43 Me. 265.

Mo.—Schneider v. Patton, 174 Mo.

684, 75 S. W. 155; C. Aultman & Co. v. Booth, 95 Mo. 383, 8 S. W. 742.

N. C.—Powell v. Ivey, 88 N. C. 256.

Ohio—Swift v. Goldridge, 10 Ohio, 230, 36 Am. Dec. 85.

Tenn.—Stanton v. Shaw, 3 Baxt. 12.

Tex.—Biococchi v. Casey-Swasey Co., 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875, where there was an actual fraudulent intent known to and participated in by the grantee; Peck v. Jones, 10 Tex. Civ. App. 335, 30 S. W. 382, where the intent to defraud did not appear but the conveyance was voluntary.

W. Va.—Farmers' Bank v. Gould, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24.

Wis.—Fargo v. Ladd, 6 Wis. 106.

cumstances, without consideration, to his grantor or assignor, is fraudulent and void as to the creditors of the former, since he could not, on becoming insolvent, reconvey property the title to which had vested in him absolutely as against the original grantor or assignor.⁹⁹

§ 35. **Property subject to power of appointment.**—It is a rule of equity in the courts of England,¹ and in this country, where it has not been abrogated by statute,² that where a person has a general power of appointment by will over property, and has exercised the power, the property thus appointed forms a part of his assets, and is subject to the claims of his creditors, in preference to those of a legatee or of the gratuitous appointee. The principle upon which the right of the creditor rests is that the absolute power of conveying or disposing of property for one's own benefit, makes the person to whom it is given the owner. The power of absolute and beneficial control cannot and ought not to be separated from the ownership.³ The power of appointment must, however, be a general power,⁴ and a court of equity

99. Ala.—Keel v. Larkin, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702.

Conn.—Chapin v. Pease, 10 Conn. 69, 25 Am. Dec. 56.

Mass.—Smith v. Lane, 3 Pick. 205.

Miss.—Walton v. Tusten, 49 Miss. 569.

Pa.—Gerker v. Bowen, 6 Phila. 548.

Can.—Johnson v. Kline, 16 Ont. 129.

1. In re Harvey, 13 Ch. D. 216, 49 L. J. Ch. 3, 28 Wkly. Rep. 73; Shattock v. Shattock, L. R. 2 Eq. 182, 35 Beav. 489, 12 Jur. N. S. 405, 35 L. J. Ch. 509, 14 L. T. Rep. N. S. 452, 14 Wkly. Rep. 600, 55 Eng. Reprint, 986; Pack v. Bathurst, 3 Atk. 269, 26 Eng. Reprint, 957; 4 Kent Com. 339; 2 Sugd. Powers, 29, § 7, 173, § 2.

2. N. Y.—Tallmadge v. Sill, 21 Barb. 34.

U. S.—Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760.

Mass.—Olney v. Balch, 154 Mass. 318, 28 N. E. 258; Clapp v. Ingraham, 126 Mass. 200.

N. H.—Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694.

Pa.—Commonwealth v. Duffield, 12 Pa. St. 277.

3. Tallmadge v. Sill, 21 Barb. (N. Y.) 34, 53.

4. Tallmadge v. Sill, *supra*, “by a general power we understand a right to appoint whomsoever the donee pleases; by a particular power it is meant that the donee is restricted to some objects designated in the deed creating the power, as to his own

will not interfere, unless the donee of the power has done some act indicating an intention to execute it.⁵ In New York the rule of English equity subjecting property subject to a general power of appointment to the debts of the donee of the power, after its exercise, has been abrogated by statute, and this asset has been withdrawn from creditors. The general purpose of the New York statute is stated to have been to place the doctrine of powers on rational grounds. The rule of English equity which made the estate embraced in a power to appoint generally by will liable to the claims of creditors, if the power was executed, but exempt therefrom if it was not executed, seemed so refined a distinction that sound logic would not tolerate it. The English rule was based upon the proposition that the right to dispose of property was equal to the ownership of the property. The New York statute recognizes that there is no distinction between the absolute power of disposition and the absolute ownership, but it confines the absolute power of disposition to a power by which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit, and does not include therein a power to appoint by will. There is no provision that a general and beneficial power, like a power of appointment generally by will, shall subject the estate embraced in it to the claims of creditors.⁶

§ 36. **Separate estate or property of debtor's wife.**—Neither the equitable nor the statutory separate property or estate of a wife can be subjected by the creditors of her husband to the payment of their claims, since they have no interest in the property, and a conveyance of such property, by the wife or by the husband and wife jointly, is not fraudulent as to the husband's creditors and cannot be avoided by them.⁷ The act of

children;" *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694.

5. *Johnson v. Cushing*, *supra*.

6. *Crooke v. Kings County*, 97 N. Y. 421; *Cutting v. Cutting*, 86 N. Y. 522.

7. N. Y.—*Mapes v. Snyder*, 59 N.

Y. 450, *aff'd* 2 Thomp. & C. 318; *Strong v. Skinner*, 4 Barb. 546.

U. S.—*Davis v. Fredericks*, 104 U. S. 618, 26 L. Ed. 849; *Stewart v. Platt*, 101 U. S. 731, 25 L. E. 816, where the property was appropriated to the payment of one of the hus-

the husband in joining in the conveyance by his wife of her separate property is not a fraud on creditors, although he receives no consideration for the act.⁸ Equity will uphold the title of the wife, as against creditors of the husband, and the validity of a conveyance of such property by the wife jointly with her husband, although the legal title to lands purchased with the means of the wife was in the husband,⁹ or was taken in the names of the husband and wife jointly,¹⁰ or, without the knowledge or consent of the wife, was taken in the husband's name,¹¹ or the property was acquired through the husband acting as the agent of his wife and otherwise assisting her.¹² Property which is purchased by a husband, the title to which is taken in his wife's name, cannot be reached by his creditors, where none of his property or money goes to pay for it, but it is purchased with the wife's separate estate.¹³

band's creditors; *Vorhees v. Blanton*, 83 Fed. 234, 89 Fed. 885, 32 C. C. A. 384.

Ala.—*Wing v. Roswald*, 74 Ala. 346.

Ga.—*Sperry v. Haslam*, 57 Ga. 412.

Ky.—*Marshall v. Marshall*, 2 Bush. 415; *Eversole v. Bullock*, 26 Ky. L. Rep. 1098, 83 S. W. 556.

Me.—*Hubbard v. Remick*, 10 Me. 140; *Wilson v. Ayer*, 7 Me. 173.

Mass.—*Stetson v. O'Sullivan*, 8 Allen, 321.

Mo.—*Cox v. Cox*, 91 Mo. 71, 3 S. W. 585; *Ault v. Eller*, 38 Mo. App. 598.

Neb.—*Jayne v. Hymer*, 66 Neb. 785, 92 N. W. 1019.

N. J.—*Dresser v. Zabriskie (Ch.)*, 39 Atl. 1066; *Quidort v. Pergeaux*, 18 N. J. Eq. 472.

S. C.—*Davidson v. Graves*, *Riley Eq.* 232.

Tenn.—*Smith v. Greer*, 3 Humph. 118.

Tex.—*McKamey v. Thorp*, 61 Tex. 648; *Aultman & Co. v. George*, 12

Tex. Civ. App. 457, 34 S. W. 652; *Cavil v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854.

Wash.—*Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100.

W. Va.—*Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405; *Hamilton v. Steele*, 22 W. Va. 348.

See *Purchase of property by husband in name of wife*, chap. II, § 6, *supra*.

8. *Besser v. Joyce*, 9 Or. 310.

9. *Sweeney v. Damron*, 47 Ill. 450; *McClanahan v. Beasley*, 56 Ky. 111. See also chap. IV, § 33, *supra*.

10. *McConnell v. Martin*, 52 Ind. 434.

11. *Eagan v. Downing*, 55 Ind. 65; *Snyder v. Martin*, 52 Ind. 434; *McConnell v. Martin*, 52 Ind. 434.

12. *Bank of Tipton v. Adair*, 172 Mo. 156, 72 S. W. 510; *Eagan v. Downing*, 55 Ind. 65. See *Services rendered by husband for wife*, chap. IV, § 13, *supra*.

13. *Popfinger v. Yutte*, 102 N. Y. 38, 6 N. E. 259; *McLean v. Hess*, 106

§ 37. Husband's curtesy or other interest in wife's property.

—The voluntary conveyance, release, or surrender by a husband of his inchoate estate or interest in his wife's real estate as tenant by the curtesy, either initiate or consummate, is fraudulent and void as against the existing creditors of the husband, and such estate or interest may be reached by creditors,¹⁴ except in those jurisdictions where the common law rule has been changed by statute so that tenancy by the curtesy is abolished,¹⁵ or the husband has no interest in the wife's separate estate by curtesy until the death of the wife,¹⁶ or the interest of the husband in his wife's land is made exempt during coverture from attachment or levy of execution for the sole debts of the husband.¹⁷ A husband's consent to his wife's devise of her real estate to others or his acquiescence therein after her death does not estop him from claiming his statutory dower interest therein, or defeat the right of the husband's creditors to reach this interest.¹⁸ But an agreement by a husband to relinquish all interest in his wife's estate in consideration of her executing her will in a designated manner and permitting it to become her last will, is valid as against his judgment creditors.¹⁹ Where the husband while indebted, releases his dower interest in the lands of his deceased wife to his children, such release, being in fraud of creditors, will be set aside, and the interest subjected to the satisfaction of his creditors.²⁰ In Iowa a husband may waive and relinquish his right of dower in lands devised by his wife

Ind. 555, 7 N. E. 567. See also Property purchased by husband in name of wife, chap. II, § 6, *supra*.

14. N. Y.—Wickes v. Clarke, 8 Paige, 161.

D. C.—National Metropolitan Bank v. Hitz, 1 Mackey, 111.

Ill.—Gay v. Gay, 123 Ill. 221, 13 N. E. 813.

Ind.—Huffman v. Copeland, 139 Ind. 221, 38 N. E. 861.

N. C.—Teague v. Downs, 69 N. C. 280.

15. Shieds v. Keys, 24 Iowa, 298.

16. Besser v. Joyce, 9 Or. 310; Guernsey v. Lazear, 51 W. Va. 328, 41 S. E. 405.

17. Ault v. Eller, 38 Mo. App. 598; Besser v. Joyce, *supra*.

18. Roach v. White, 94 Ind. 510; O'Harra v. Stone, 48 Ind. 417.

19. Huffman v. Copeland, 139 Ind. 221, 38 N. E. 86; Wright v. Jones, 105 Ind. 17, 4 N. E. 281.

20. Maclaren v. Stone, 18 Ohio Cir. Ct. 854, 9 Ohio Cir. Dec. 794.

to another, so that the title thereto will be unaffected by any liens of his creditors.²¹ The fact that by virtue of the marriage a husband acquired property of his wife is not sufficient to support a conveyance to her or for her use made by the husband in fraud of creditors, and where the property of the wife has been reduced to possession by the husband and becomes his absolute property, such property, if fraudulently transferred or invested in other property, in his own or his wife's name, may be reached and subjected by creditors of the husband to the payment of their claims.²² But a husband may waive or decline to assert his marital right to the interest given him by law in his wife's personal property and consent to her retaining and disposing of the same, and a transfer of such property where it has never been reduced to his possession by the husband is not

21. *Shields v. Keys*, 24 Iowa, 298.

22. *U. S.*—*Lee v. Hollister*, 5 Fed. 752; *Dick v. Hamilton*, 7 Fed. Cas. No. 3,890, Deady, 322; but such a conveyance is valid, if the husband was solvent at the time, and it was not made with intent to defraud creditors.

Ala.—*Bolling v. Jones*, 67 Ala. 508.

Fla.—*America Freehold Land, etc., Co. v. Maxwell*, 39 Fla. 489, 22 So. 751, there is no implied trust for the wife which will support, as against creditors, a conveyance by the husband to the wife.

Ga.—*Sayre v. Flournoy* 3 Ga. 541.

Ill.—*Bridgford v. Reddell*, 55 Ill. 261.

Ind.—*Meredith v. Citizens' Nat. Bank*, 92 Ind. 343; *Westerfield v. Kimmer*, 82 Ind. 365; *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *Buchanan v. Lee*, 69 Ind. 117; *Holland v. Moody*, 12 Ind. 170.

Iowa.—*Boulton v. Hahn*, 58 Iowa, 518, 12 N. W. 560.

Ky.—*Lyne v. Commonwealth Bank*, 28 Ky. 545; *Davis v. Justice*, 14 Ky. L. Rep. 741, 21 S. W. 529; *Topp v. Todd*, 16 Ky. L. Rep. 382; *Gravey v. Moore*, 12 Ky. L. Rep. 732, 15 S. W. 136.

Md.—*Wylie v. Basil*, 4 Md. Ch. 327.

Mass.—*Pierce v. Thompson*, 17 Pick. 391.

Mo.—*Hart v. Leete*, 104 Mo. 315, 15 S. W. 976.

N. C.—*Allen v. Allen*, 41 N. C. 293.

Pa.—*Gicker's Adm'rs v. Martin*, 50 Pa. St. 138.

S. C.—*Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426.

Tenn.—*Joiner v. Franklin*, 12 Lea, 420.

W. Va.—*Clarks v. King*, 34 W. Va. 631, 12 S. E. 775.

Wis.—*Howe v. Colby*, 19 Wis. 583.

Eng.—*In re Holland*, 70 L. J. Ch. 625, 2 Ch. 145, 85 L. T. Rep. N. S. 304, 8 Munson, 266, 49 Wkly. Rep. 476.

fraudulent as to his creditors.²³ A husband has no vested interest in the choses in action, or other personal property of his wife, until he reduces them into his possession by virtue of his marital rights, and his failure to do so is not fraudulent as against his creditors.²⁴ Creditors of the husband who claim to be subrogated to his rights can have no other rights than the husband as against the wife's property.²⁵

§ 38. Wife's dower or other interest in husband's property.

—The dower right of a widow prior to its assignment or admeasurement on the death of her husband is a complete right which is a chose in action within the contemplation of a statute, or the rule in equity in certain jurisdictions, making choses in action applicable to the payment of debts, and a release of dower right without consideration, to avoid payment of debts, is fraudulent, and may be set aside at the instance of the creditors of the widow.²⁶ But an unassigned or unadmeasured right

23. *N. Y.*—Jaycox v. Caldwell, 51 N. Y. 395.

Ala.—Wing v. Roswald, 74 Ala. 346.

Ky.—Louisville City Nat. Bank v. Wooldridge, 116 Ky. 641, 76 S. W. 542, 25 Ky. L. Rep. 869; George v. Bussing, 15 B. Mon. 558; McCauley v. Rhodes, 7 B. Mon. 462; Bowling v. Winslow, 5 B. Mon. 29.

Mo.—Hart v. Leete, 104 Mo. 315, 15 S. W. 976; Cox v. Cox, 91 Mo. 71, 3 S. W. 585.

N. J.—Peterson v. Mulford, 36 N. J. L. 481, gift by husband to wife of the avails of her own labor.

24. *N. Y.*—Woodworth v. Sweet, 51 N. Y. 8, *aff'g* 44 Barb. 268; Jaycox v. Caldwell, 51 N. Y. 395, *aff'g* 37 How. Pr. 240.

U. S.—Gallego v. Chevalie, 9 Fed. Cas. No. 5,200, 2 Brock. 285.

Ala.—Bradford v. Goldsborough 15 Ala. 311.

Ga.—Sperry v. Haslam, 57 Ga. 412; Sayre v. Flournoy, 3 Ga. 541.

Ky.—McClanahan v. Beasley, 17 B. Mon. 11.

Md.—Drury v. Briscoe, 42 Md. 154, wife's distributive share of her father's estate.

Mass.—Gassett v. Grout, 4 Mete. 486, wife's distributive share of her father's estate.

Mo.—Terry v. Wilson, 63 Mo. 493; Hart v. Leete, *supra*; Cox v. Cox, *supra*.

Pa.—Donnelly v. Public Ledger, 2 Phila. 51; Smethurst v. Thurston, Brightly, 127.

S. C.—Durr v. Bowyer, 2 McCord, 368; Higgenbottom v. Peyton, 3 Rich. Eq. 398; Perryclear v. Jacobs, 2 Hill Eq. 504.

25. Sayre v. Flournoy, 3 Ga. 541.

26. Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 Atl. 516. See Choses in action, chap. IV, § 7, *supra*.

of dower cannot be reached by a creditor's bill in those jurisdictions where choses in action cannot be reached by creditors, in the absence of any provision therefor by statute.²⁷ Under the Indiana statute an interest in land equal to one-third its value is, as to the wife of the owner, free from a judgment against the latter, and a conveyance thereof by her is not fraudulent as to the judgment creditor.²⁸ A creditor, therefore, is not harmed by an alleged fraudulent conveyance made by the debtor to his wife, if the value of her inchoate interest in the property together with the debtor's statutory exemption, and all liens senior to that of the creditor, equal or exceed the value of the property transferred.²⁹

§ 39. **Community property.**—The transfer of community property from a husband to his wife is not even evidence of fraud as to the separate creditors of the husband, as no one but the community creditors can question the good faith of such transfer and subject such property to the payment of debts.³⁰ In Texas a married woman has the right to convey her property in trust for herself and her children, so as to withdraw the rents from the community estate, and such conveyance will not be fraudulent as to her husband's creditors.³¹

§ 40. **Property of adopted child.**—In Kentucky where a statute places one who adopts a child under the same responsibilities as if the person so adopted were his own child, the property of an adopted child cannot be reached by creditors of a parent on the ground that the child's maintenance has been borne by the parents, the provision made for the child not being unreasonable.³²

27. *Harper v. Clayton*, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211.

28. *Isgrigg v. Pauley*, 148 Ind. 436, 47 N. E. 821; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

29. *Marmon v. White*, 151 Ind. 445, 51 N. E. 930.

30. *Reed Bros. v. Nicholson*, 189 Mo. 396, 88 S. W. 71; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240.

31. *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S. W. 559.

32. *Anderson v. Mundo & McGraw*, 25 Ky. L. Rep. 1644, 77 S. W. 926.

§ 41. **Exempt property in general.**—As exempt property cannot be taken and is not subject to sale by creditors in satisfaction of debts, it is evident that creditors cannot be hindered, delayed, or defrauded by the transfer of property which cannot be made to contribute, either at law or in equity, to the satisfaction of their debts. The object of the statute of Elizabeth and similar statutes being to prevent debtors from dealing with their property to the prejudice of their creditors, it is obvious that dealing with that which creditors, irrespective of such dealing, could not have touched, is not within either the letter or the spirit of such statutes.³³ Hence the general rule that property which is, by statute, exempt from execution, is not susceptible of fraudulent alienation, and a conveyance thereof is not invalid because voluntary, nor because it was executed with intent to hinder, delay, and defraud creditors.³⁴ It is also

33. *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *McLeod's Trustee v. McLeod*, 28 Ky. L. Rep. 284, 667, 89 S. W. 199, 90 S. W. 5.

34. *N. Y.*—*Smillie v. Quinn*, 90 N. Y. 493; *McGivney v. Childs*, 41 Hun. 607; *Whiting v. Barrett*, 7 Lans. 106; *Spaulding v. Keyes*, 1 Silv. Sup. 203, 5 N. Y. Supp. 227; *Youmans v. Boomhower*, 3 Thomps. & C. 21.

U. S.—*In re Wilson*, 123 Fed. 20, 59 C. C. A. 100; *Daugherty v. Bogy*, 104 Fed. 938, 44 C. C. A. 266.

Ala.—*Skinner v. Jennings*, 137 Ala. 295, 34 So. 622; *Cross v. Berry*, 132 Ala. 92, 31 So. 36; *Brinson v. Edwards*, 94 Ala. 447, 10 So. 219; *Myers v. Conway*, 90 Ala. 109, 7 So. 639; *Nance v. Nance*, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; *Alley v. Daniel*, 75 Ala. 403; *Wright v. Smith*, 66 Ala. 514; *Garner v. Bridges*, 38 Ala. 276.

Ark.—*Hinkle v. Broadwater*, 84 S. W. 510; *Wilks v. Vaughan*, 83 S. W.

913; *Sims v. Phillips*, 54 Ark. 193, 15 S. W. 461; *Sannor v. King*, 49 Ark. 299, 5 S. W. 327, 4 Am. St. Rep. 49, where the total valuation of a judgment debtor's property, including property fraudulently transferred to his wife, is less than the amount exempt by law, his creditors cannot seize the transferred property in the hands of the transferee; *Bennett v. Hutson*, 33 Ark. 762.

Conn.—*Ketchum v. Allen*, 46 Conn. 414; *Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166.

D. C.—*Cassin v. Bozzle*, 6 D. C. 260.

Ill.—*Berry v. Hanks*, 28 Ill. App. 51; *Vaughan v. Thompson*, 17 Ill. 78; *Vinton v. Felts*, 71 Ill. App. 630, a conveyance by a husband to his wife of property exempt from execution, when no execution exists against him, is not fraudulent as to subsequent execution creditors. See also *Washburn v. Goodheart*, 88 Ill. 229.

Ind.—*Hedrick v. Hall*, 155 Ind. 371,

generally maintained that a fraudulent conveyance, or an attempted fraudulent conveyance, of personal property, does not defeat the debtor's right to claim his exemptions therein and

58 N. E. 257; *Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *Fulp v. Beaver*, 136 Ind. 319, 36 N. E. 250; *Phe-nix Ins. Co. v. Fulder*, 133 Ind. 557, 33 N. E. 270; *Citizens Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705; *Goudy v. Werbe*, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; *Dumbould v. Rowley*, 113 Ind. 253, 15 N. E. 463; *Barnard v. Brown*, 112 Ind. 53, 13 N. E. 401; *Burdge v. Bolin*, 106 Ind. 175, 6 N. E. 140; *Kolb v. Raisor*, 17 Ind. App. 551, 47 N. E. 177. As a general rule, a voluntary conveyance, made by an insolvent debtor who has not sufficient other property subject to execution to pay his debts, is constructively fraudulent as against existing creditors; but this is true only where the property so disposed of was not at the time exempt from execution, but such as the creditor might have reached in the hands of the debtor. *Faurote v. Carr*, 103 Ind. 123, 9 N. E. 350.

Iowa.—*Foreman v. Citizens' State Bank*, 128 Iowa, 661, 105 N. W. 163; *Gollobitsch v. Rainbow*, 84 Iowa, 567, 51 N. W. 48; *Beyer v. Thoeming*, 81 Iowa, 517, 46 N. W. 1074; *Payne v. Wilson*, 76 Iowa, 377, 41 N. W. 45; *Brainard v. Simmons*, 67 Iowa, 646, 25 N. W. 844.

Kan.—*Mull v. Jones*, 33 Kan. 112, 5 Pac. 388; *Arthur v. Wallace*, 8 Kan. 267.

Ky.—*McLeod's Trustee v. McLeod*, 28 Ky. L. Rep. 284, 667, 89 S. W. 199, 90 S. W. 5; *Morton v. Reagan*,

68 Ky. 334; *Anthony v. Wade*, 64 Ky. 110; *Berry v. Ewen*, 27 Ky. L. Rep. 467, 85 S. W. 227, under a statute exempting certain moneys of the husband from execution for his debts, a creditor of the husband cannot complain if the husband gives such exempt money to his wife, or invests it in land, the title to which is taken in her name; *Minor v. Sharp*, 17 Ky. L. Rep. 992, 33 S. W. 411.

Me.—*Pulsifer v. Waterman*, 73 Me. 233; *Legro v. Lord*, 10 Me. 161. *Compare* *Nason v. Hobbs*, 75 Me. 396.

Mass.—*Mannan v. Merritt*, 11 Allen, 582; *Bean v. Hubbard*, 4 Cush. 85. *Compare* *Tuealey v. Robinson*, 103 Mass. 558, 4 Am. Rep. 575.

Mich.—*Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735; *Dull v. Merrill*, 69 Mich. 49, 36 N. W. 677; *Fisher v. McIntyre*, 66 Mich. 681, 33 N. W. 762; *Emerson v. Bacon*, 58 Mich. 526, 25 N. W. 503; *Buckley v. Wheeler*, 52 Mich. 1, 17 N. W. 216; *Anderson v. Odell*, 51 Mich. 492, 16 N. W. 870; *Rosenthal v. Scott*, 41 Mich. 632, 2 N. W. 909.

Minn.—*Horton v. Kelly*, 40 Minn. 193, 41 N. W. 1031; *Furman v. Tenny*, 28 Minn. 77, 9 N. W. 172.

Miss.—*Williamson v. Wilkinson*, 81 Miss. 503, 33 So. 282; *O'Connor v. Ward*, 60 Miss. 1025; *Smith v. Allen*, 39 Miss. 469.

Mo.—*Stam v. Smith*, 183 Mo. 464, 81 S. W. 1217; *Versailles Bank v. Buthrey*, 127 Mo. 189, 29 S. W. 1004; 48 Am. St. Rep. 621; *Davis v. Land*, 88 Mo. 436; *Megehe v. Draper*, 21 Mo. 510, 64 Am. Dec. 245; *Kiely v. Hickox*, 70 Mo. App. 617; *Stotes-*

to establish and enforce them.³⁵ A contrary rule, however, prevails in some jurisdictions,³⁶ and it is held by some authorities

bury v. Kirtland, 35 Mo. App. 148; *Hombs v. Corbin*, 34 Mo. App. 393; *Kulage v. Schueler*, 7 Mo. App. 250.

Neb.—*Munson v. Carter*, 40 Neb. 417, 58 N. W. 931; *Bloedorn v. Jewell*, 34 Neb. 649, 52 N. W. 367; *Gillespie v. Brown*, 16 Neb. 457, 20 N. W. 632; *Boggs v. Thompson*, 13 Neb. 403, 14 N. W. 393. Fraud is an immaterial issue in an action by the vendee of exempt property to quiet his title, as against judgment creditors of the vendor. *Smith v. Neufeld*, 61 Neb. 699, 85 N. W. 898.

Nev.—*Bailey v. Littell*, 24 Nev. 294, 53 Pac. 308.

N. J.—*Dresser v. Zabriskie* (Ch.), 39 Atl. 1066.

N. M.—*Heisch v. Bell*, 70 Pac. 572.

N. C.—*Arnold v. Estis*, 92 N. C. 162; *Gaster v. Hardie*, 75 N. C. 460; *Montgomery County v. Riley*, 75 N. C. 144; *Winchester v. Gaddy*, 72 N. C. 115; *Duvall v. Rollins*, 71 N. C. 218.

N. Dak.—*Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889.

Ohio.—*Tracy v. Cover*, 28 Ohio St. 61.

S. C.—*Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790.

S. D.—*Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96.

Tenn.—*Leslie v. Joyner*, 2 Head. 514; *Layman v. Denton* (Ch. App.), 42 S. W. 153.

Tex.—*Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Wood v. Chambers*, 20 Tex. 247, 70 Am. Dec. 382; *McClelland v. Barnard*, 36 Tex. Civ. App. 118, 81 S. W. 591; *Heidelberg v. Carter*, 34 Tex. Civ. App. 579, 79

S. W. 346; *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86.

Vt.—*Darling v. Ricker*, 68 Vt. 471, 35 Atl. 376; *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39; *Premo v. Hewitt*, 55 Vt. 362; *Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849; *Prout v. Vaughn*, 52 Vt. 451; *Hayward v. Clark*, 50 Vt. 612; *Jewett v. Guyer*, 38 Vt. 209; *Foster v. McGregor*, 11 Vt. 595, 34 Am. Dec. 713.

Wis.—*Chicago Coffin Co. v. Maxwell*, 70 Wis. 282, 35 N. W. 733; *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3; *Carhart v. Harshaw*, 45 Wis. 340, 30 Am. Rep. 752; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148; *Dreutzer v. Bell*, 11 Wis. 114; *Bond v. Seymour*, 2 Pinn. 105, 1 Chandl. 40.

See Reservation of exempt property, chap. X, § 13, *infra*.

35. *U. S.*—*Naumburg v. Hyatt*, 24 Fed. 898.

Ark.—*Sannoner v. King*, 49 Ark. 299, 5 S. W. 327, 4 Am. St. Rep. 49.

Mich.—*Rosenthal v. Scott*, 41 Mich. 632, 2 N. W. 909.

Mo.—*Megehe v. Draper*, 21 Mo. 510, 64 Am. Dec. 245; *State, Niemann v. Koch*, 47 Mo. App. 269.

N. C.—*Gaster v. Hardie*, 75 N. C. 460; *Duvall v. Rollins*, 71 N. C. 218.

Ohio.—*Tracy v. Cover*, 28 Ohio St. 61.

Tex.—*King v. Harter*, 70 Tex. 579, 8 S. W. 308.

36. *Ill.*—*Bohn v. Weeks*, 50 Ill. App. 236.

Ind.—*Chandler v. Jessup*, 132 Ind. 351, 31 N. E. 1109, where a conveyance of land is set aside as fraudulent, and the property sold, the debtor cannot claim a portion of the

that the debtor may lose the benefit of the exemption laws, by concealment of his property or other fraud, as against his creditors.³⁷ The disposition of property exempt from execution of which creditors cannot complain, and to which the general rule stated above applies, includes the assignment or transfer of life insurance policies,³⁸ in some jurisdictions pension or bounty checks, drafts, or moneys,³⁹ and exempted earnings or wages.⁴⁰

proceeds as exempt from execution; *Holman v. Martin*, 12 Ind. 553; *Mandlove v. Burton*, 1 Ind. 39. See also *Jones v. Dipert*, 123 Ind. 594, 23 N. E. 944.

Me.—*Wyman v. Gay*, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238; *Nason v. Hobbs*, 75 Me. 396.

Mass.—*Stevenson v. White*, 5 Allen, 148.

Miss.—*Williamson v. Wilkinson*, 81 Miss. 503, 33 So. 282.

N. H.—*Tilton v. Sanborn*, 59 N. H. 290.

Pa.—*Moore v. Baker*, 2 Pa. Dist. 142; *Carl v. Smith*, 8 Phila. 569.

37. *Ill.*—*Cassell v. Williams*, 12 Ill. 387; *Cook v. Scott*, 6 Ill. 333.

Pa.—*Kreider's Estate*, 135 Pa. St. 584, 19 Atl. 1073; *Imhoff's Appeal*, 119 Pa. St. 350, 13 Atl. 279; *Smith v. Emerson*, 43 Pa. St. 456; *Strouse v. Beeker*, 38 Pa. St. 190; *Gilleland v. Rhoads*, 34 Pa. 187; *Freeman v. Smith*, 30 Pa. St. 264; *Dieffenderfer v. Fisher*, 3 Grant, 30; *Carl v. Smith*, 8 Phila. 569; *Larkin v. McAnnally*, 5 Phila. 17.

Va.—*Rose v. Sharpless*, 33 Gratt. 153.

38. *N. Y.*—*Smillie v. Quinn*, 90 N. Y. 492.

Fla.—*Eppinger v. Canepa*, 20 Fla. 262.

Me.—*Pulsifer v. Hussey*, 9 Am. B. R. 657, 97 Me. 434, 54 Atl. 1076, construing certain sections of the Fed-

eral Bankruptcy Act of 1898 and *Me. Rev. St.*, chap. 49, § 75, chap. 75, § 10. But see *Wyman v. Gay*, 90 Me. 36, 37 Atl. 325, 60 Am. Rep. 238.

Md.—*Elliott v. Bryan*, 64 Md. 368, 1 Atl. 614.

S. C.—*Barron v. Williams*, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840.

Tenn.—*Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083.

See also chap. IV, § 20, *supra*.

39. *N. Y.*—A pension granted by the United States for military service is exempt by *Code Civ. Proc.*, § 1393, until it ceases to be a pension, although it is not protected by the *U. S. Rev. Stat.*, except while in course of transmission. Hence, it has been held to be exempt when it has been deposited in a bank on interest, after having been received into the possession of the pensioner. *Stockwell v. National Bank of Malone*, 36 Hun, 583. And when deposited subject to check. *Burgett v. Fancher*, 35 Hun, 647. Where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt from execution to the amount of the pension money put into the property. *Yates County Nat. Bank v. Carpenter*,

And it has also been held to include the transfer of growing

119 N. Y. 550, 23 N. E. 1108, 16 Am. St. Rep. 855, 30 St. Rep. 121, 7 L. R. A. 557; *Countryman v. Countryman*, 28 N. Y. Supp. 258, 23 Civ. Pro. 161. But where the proceeds of a pension have been embarked in trade, commerce or speculation, and become mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the statutory exemption. *Id.* The pensioner may relinquish the pension by transfer to another. *Fritz v. Worden*, 20 App. Div. 241, 46 N. Y. Supp. 1040; *Burgett v. Fancher*, 35 Hun, 647. Neither under the State or the Federal statute is pension money exempt, after the pensioner's death, from liability for his debts, in favor of descendants other than a family for whom the pensioner provided. *In re Winans*, 5 Dem. 138.

Bounty money received by a debtor for enlistment in the army, being exempt from the claim of creditors under § 1393, Code Civ. Proc., may be given to the wife without any fraud on them. *Spaulding v. Keyes*, 1 Silv. Sup. 203, 5 N. Y. Supp. 227; *Whiting v. Barrett*, 7 Lans. 106; *Youmans v. Boomhower*, 3 Thomps. & C. 20.

Iowa.—Under Iowa acts, exempting pension moneys from execution, one who invests pension money in colts, in paying for the services of a stallion, has a property interest in them which is, to that extent, exempt. *Diamond v. Palmer*, 78 Iowa, 578, 44 N. W. 819. Such laws have no application to the money of a pensioner who died before the enactment. *Baugh v. Barrett*, 69 Iowa, 495.

Ky.—A check received by a veteran as a pension for his military services

is absolutely free from the claims of his creditors, and may be disposed of by him in such manner as he deems proper. *Falkenburg v. Johnson*, 102 Ky. 543, 19 Ky. L. Rep. 1606, 44 S. W. 80, 80 Am. St. Rep. 369. Land in which a pensioner has invested his pension is not exempt from seizure for his debts, and a conveyance thereof made to the pensioner's wife does not exempt it from liability for his debts, under U. S. Rev. Stat., § 4747. *Johnson v. Elkins*, 90 Ky. 163, 13 Ky. L. Rep. 967, 13 S. W. 448, 8 L. R. A. 552; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 880; *Sims v. Walsham*, 9 Ky. L. Rep. 912, 7 S. W. 557; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304.

Me.—Pension money actually in the hands of the pensioner is not exempt from execution. *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739; *Crane v. Linnens*, 77 Me. 59.

Pa.—Under Pension Laws U. S. Rev. St., § 4747, providing that "no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner," it is not a fraud upon creditors for the pensioner to give his pension money to his wife for the purpose of purchasing a home, in her name, for their joint benefit. *Holmes v. Tallada*, 125 Pa. St. 133, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219, 23 Wkly. Notes Cas. 463. Pension money cannot be attached on the

crops,⁴¹ and exempt improvements on Indian agricultural lands

ground that it has been fraudulently assigned by the pensioner. *Clark v. Ingraham*, 15 Phila. 646, 36 Leg. Int. 393. The proceeds of a pension check deposited with a bank for collection are not liable to attachment. *Reiff v. Mack*, 160 Pa. St. 265, 28 Atl. 699, 40 Am. St. Rep. 720. Real estate bought by a pensioner in the name of his wife, with his pension money, is liable to seizure and sale for his debts. *Burtch v. Burtch*, 14 Pa. Co. Ct. 482, 11 Lanc. L. Rev. 237.

Vt.—A pension draft, being exempt from execution, may be made the subject of a gift by the pensioner without fraud upon his creditors. *Hayward v. Clark*, 50 Vt. 612.

Can.—Money received by a debtor from the crown for contract work cannot be garnisheed before being paid by the crown, but a gift of them after payment is fraudulent under the statute of Elizabeth. *Nicholson v. Shannon*, 28 Grant Ch. (U. C.) 378.

40. *Ida.*—*Elliot v. Hall*, 3 Ida. 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

Iowa.—*Ehlers v. Blumer* (1905), 105 N. W. 406; *Nash v. Stevens*, 96 Iowa, 616, 65 N. W. 825; *Robb v. Brewer*, 60 Iowa, 539, 15 N. W. 420; *Patterson v. Johnson*, 59 Iowa, 397, 13 N. W. 416.

Ky.—*Wallace v. Mason*, 100 Ky. 560, 38 S. W. 887, 18 Ky. L. Rep. 935.

Mo.—*Jarboe v. Jarboe*, 106 Mo. App. 459, 79 S. W. 1162; *Furth v. March*, 101 Mo. App. 329, 74 S. W. 147.

Mont.—*Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337.

Neb.—*Union Pac. R. Co. v. Smersh*, 22 Neb. 751, 36 N. W. 139, 3 Am. St. Rep. 290.

N. H.—*Provencher v. Brooks*, 64 N. H. 479, 13 Atl. 641.

Ohio.—*Stump v. Frary*, 13 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 357, it is not fraudulent as to creditors for a husband to give his exempt wages to his wife, who applies them in part to paying for a home, taking the title in her name.

Wis.—*Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772, moneys of a debtor in his wife's hands are not exempt under the Wisconsin statute exempting the earnings of a married person with dependent family for three months next preceding the issuing of garnishment process, to the amount of \$60 for each month, where they have been accumulated for three years in payments of less than \$60 per month, although they were exempt at the time they were paid over to her.

41. *Layman v. Denton* (Tenn. Ch. App.), 42 S. W. 153, creditors cannot complain of a mortgage given by a debtor to secure another creditor on a growing crop before November 15, but which creditors under the Tennessee statute are not allowed to levy upon, as fraudulent as a matter of law.

Crops grown on lands purchased with pension money are, however, not exempt from execution, under the Iowa statute, providing that the homestead of a pensioner purchased and paid for with pension money, or the proceeds and accumulations of such pension money, shall be exempt from execution or attachment. *Haefer v. Mullison* (Iowa),

when conveyed by a citizen of an Indian tribe.⁴² The rule does not apply, however, where the right to an exemption arises after a fraudulent conveyance, or the property was not exempt at the time of the conveyance.⁴³ For example, where the exemption does not attach to the particular property until it is claimed or selected,⁴⁴ or where exempt property designed and procured, and necessary for carrying on the debtor's trade or business, and intended to be used therein, and no part of which has been set aside for that purpose, is conveyed, by the debtor because he has changed his original design and abandoned such intended use of the property,⁴⁵ or where the debtor never intended or made

57 N. W. 893. See also *Crops grown on homestead*, chap. IV, § 44, *infra*.

42. *Daugherty v. Bogy*, 104 Fed. 938, 44 C. C. A. 266.

43. *Fritz v. Worden*, 20 App. Div. (N. Y.) 241, 46 N. Y. Supp. 1040; *Phoenix Ins. Co. v. Fielder*, 133 Ind. 557, 33 N. E. 270; *Luce v. Barnum*, 19 Mo. App. 359; *Alt v. Lafayette Bank*, 9 Mo. App. 91; *Martin v. Crosby*, 11 Lea (Tenn.), 198.

44. N. Y.—*Field v. Ingreham*, 15 Misc. Rep. 529, 37 N. Y. Supp. 1135.

Ala.—*Cross v. Berry*, 132 Ala. 92, 31 So. 36, where the value of property mortgaged exceeded the amount of exemption allowed, the rule that a conveyance of exempt property is not fraudulent as to creditors being applicable "only in cases where the property conveyed constitutes all that is owned and possessed by the grantor, and does not exceed in value his exemption under the law." *Skinner v. Jennings*, 137 Ala. 295, 34 So. 622, but where the property conveyed was worth less than the exemption allowed, the creditors are not in a position to question the debtor's right to convey; *Alley v. Daniel*, 75 Ala. 403.

Cal.—*Barton v. Brown*, 68 Cal. 11.

Ill.—*Bohn v. Weeks*, 50 Ill. App. 236.

Me.—*Wyman v. Gay*, 90 Me. 36, 37 Atl. 325, 60 Am. St. Rep. 238, the debtor waives a personal privilege when he conveys exempt property to another, and if the conveyance works a fraudulent preference under the insolvent law, the assignee may recover the property or its value; *Nason v. Hobbs*, 75 Me. 396.

Mo.—*Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Stewart v. Stewart*, 65 Mo. App. 663; *Stotesbury v. Kirtland*, 35 Mo. App. 148; *Hombs v. Corbin*, 34 Mo. App. 393; *Alt v. Lafayette Bank*, 9 Mo. App. 91.

Pa.—*Huey's Appeal*, 29 Pa. St. 219; *Larkin v. McAnnally*, 5 Phila. 17.

45. *Rayner v. Whicher*, 6 Allen (Mass.), 292; *Stevenson v. White*, 5 Allen (Mass.), 148, if made and received with intent to defraud creditors. But see *Ketchum v. Allen*, 46 Conn. 414, the fact that, if the sale was fraudulent as to creditors, the property would be no longer protected by the statute as the seller's, because not now used by him in his business, does not affect the case.

such use of the property as was required to render it exempt,⁴⁶ the conveyance of the property is fraudulent as against creditors. So, a conveyance of exempt property which a statute provides shall not be exempt from execution issued upon a judgment for the purchase money thereof is fraudulent as against a judgment for the purchase price, and the failure of the vendor to file a notice required by the statute will not prevent him from following the property into the hands of a fraudulent transferee.⁴⁷ The owner of property exempt from execution may sell it or give it away; and if the transfer is fully completed, the property will not thereafter be liable to his creditors, whatever may have been his motive in making the gift;⁴⁸ and the fact that, after a sale or gift of exempt property, valid when made, the debtor, from some change in his circumstances, could no longer hold the property as exempt, if the sale or gift were avoided, is immaterial.⁴⁹ But though one may give away exempt property, his creditors may attack as fraudulent a transaction by which he sells exempt property and with the proceeds buys non-exempt property, taking title in another to put it beyond the reach of creditors.⁵⁰ It is not a fraud upon creditors for an insolvent debtor to purchase with his own money property exempt from levy on execution, even though he does so with the purpose of putting it beyond their reach.⁵¹ He exercises a privilege, which the law gives him and wrongs no one. If he buys provisions for his family, or a

46. *Connors v. Hawkins*, 66 Tex. 639, 2 S. W. 520.

47. *Lillibridge v. Walsh*, 97 Mich. 459, 56 N. W. 854.

48. *Colbert v. Sutton*, 5 Del. Ch. 294; *Pearson v. Quist*, 79 Iowa, 54, 44 N. W. 217.

49. *Carhart v. Hershaw*, 45 Wis. 340, 30 Am. Rep. 752, sale of his library by a professional man.

50. *McLeod's Trustee v. McLeod*, 28 Ky. L. Rep. 284, 667, 89 S. W. 199, 90 S. W. 5.

51. *Cipperly v. Rhodes*, 53 Ill.

346, where the debtor purchased a homestead in the name of his wife; *O'Donnell v. Segar*, 25 Mich. 367, the fact that the debtor had disposed of all the property he had which was subject to the execution, for the very purpose of investing the proceeds in, or converting them into, that kind of property which was exempt under the statute, does not deprive him of the exemption, so long as his occupation is really such as the statute requires, and the particular property is needed in that occupation.

cow, or necessary clothing, he merely puts his property in a shape which the humanity of the law authorizes.⁵² But if an insolvent debtor sells property subject to execution and with the proceeds immediately purchases exempt property, the only remedy of the creditor is by attacking and overturning the sale of the non-exempt property.⁵³

§ 42. **Homesteads in general.**—As a debtor's exempt homestead is not subject to the demands or remedies of his creditors, a conveyance thereof, whether made with or without consideration, and irrespective of the intent of the parties, or whether the conveyance be to the wife or to a third person, is not fraudulent, and cannot be set aside as fraudulent, as against creditors, and the property so conveyed reached in the hands of the grantee.⁵⁴ And a fraudulent conveyance or an attempted fraudulent

52. *Tucker v. Drake*, 11 Allen (Mass.), 145.

53. *Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465.

54. *U. S.*—In *re Wilson*, 123 Fed. 20, 59 C. C. A. 100; *Thomson v. Crane*, 73 Fed. 327; *Green v. Root*, 62 Fed. 191; *Farwell v. Kerr*, 28 Fed. 345; *Volentine v. Hurd*, 21 Fed. 749; *Cox v. Wilder*, 6 Fed. Cas. No. 3,308, 2 Dill. 45; *Smith v. Kehr*, 22 Fed. Cas. No. 13,071, 2 Dill. 50.

Ala.—*Steiner v. Berney*, 130 Ala. 289, 30 So. 570; *First Nat. Bank v. Browne*, 128 Ala. 557, 29 So. 552, 86 Am. St. Rep. 156; *Fuller v. Whitlock*, 99 Ala. 411, 13 So. 80; *Hodges v. Winston*, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; *Lehman v. Bryan*, 67 Ala. 558; *Fellows v. Lewis*, 65 Ala. 343, 39 Am. Rep. 1.

Ariz.—*Luhrs v. Hancock* (1899), 57 Pac. 605.

Ark.—*Isbell v. Jones* (1905), 88 S. W. 593; *Hinkle v. Broadwater* (1905), 84 S. W. 510; *Wilks v.*

Vaughan (1904), 83 S. W. 913; *Gray v. Paterson*, 65 Ark. 273, 46 S. W. 730, 1119, 67 Am. St. Rep. 937; *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Stanley v. Snyder*, 43 Ark. 429; *Flask v. Tindall*, 39 Ark. 571; *Bennett v. Hutson*, 33 Ark. 762.

Cal.—*Wetherly v. Strauss*, 93 Cal. 283, 28 Pac. 1045.

Colo.—*Barnett v. Knight*, 7 Colo. 365, 3 Pac. 747, the sale of a homestead entirely exempt from execution, in consideration of the future support of the insolvent grantor, cannot be set aside at the suit of his creditors, since they were not injured thereby.

Fla.—*Murphy v. Farquhar*, 39 Fla. 350, 22 So. 681.

Ill.—*First Nat. Bank v. Rhea*, 155 Ill. 434, 40 N. E. 551; *Moore v. Flynn*, 135 Ill. 74, 25 N. E. 844; *Boyd v. Barnett*, 24 Ill. App. 199;

lent conveyance of lands does not defeat the homestead right of

Shackleford v. Todhunter, 4 Ill. App. 271; *Lytle v. Scott*, 2 Ill. App. 646.

Ind.—*Isgrigg v. Pauley*, 148 Ind. 436, 47 N. E. 821; *Nichols, etc., Co. v. Burch*, 128 Ind. 324, 27 N. H. 737; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

Iowa.—*Richards v. Orr*, 118 Iowa, 724, 92 N. W. 655; *Sstate Ins. Co. v. Prestage*, 116 Iowa, 466, 90 N. W. 62; *Wheeler, etc., Mfg. Co. v. Bjelland*, 97 Iowa, 637, 66 N. W. 885; *Clark v. Raymond*, 86 Iowa, 661, 53 N. W. 354; *Officer v. Evans*, 48 Iowa, 557; *Huginin v. Dewey*, 20 Iowa, 368.

Kan.—*Winter v. Ritchie*, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697.

Ky.—*Deweese v. Deweese*, 28 Ky. L. Rep. 726, 90 S. W. 256; *Roark v. Bach*, 116 Ky. 457, 25 Ky. L. Rep. 699, 76 S. W. 340; *Davis v. H. Feltman Co.*, 112 Ky. 293, 23 Ky. L. Rep. 1510, 65 S. W. 615, 95 Am. St. Rep. 289; *Morrow v. Bailey*, 109 Ky. 359, 22 Ky. L. Rep. 861, 59 S. W. 2, 95 Am. St. Rep. 382; *Carroll v. Dawson*, 103 Ky. 736, 20 Ky. L. Rep. 349, 46 S. W. 222; *Baker v. Hines*, 102 Ky. 329, 10 Ky. L. Rep. 1354, 43 S. W. 452; *Snapp v. Snapp*, 87 Ky. 554, 10 Ky. L. Rep. 598, 9 S. W. 705.

La.—*Cottingham's Succession*, 29 La. Ann. 669.

Me.—*Legro v. Lord*, 10 Me. 161.

Mass.—*Castle v. Palmer*, 6 Allen, 401, conveyance by a husband to a third person, and by the latter to the wife.

Mich.—*Gasser v. Crittenden*, 140 Mich. 301, 103 N. W. 601; *Michigan*

Trust Co. v. Comstock, 130 Mich. 572, 90 N. W. 331; *Dickey v. Converse*, 117 Mich. 449, 457, 76 N. W. 80, 72 Am. St. Rep. 568; *Nash v. Geraghty*, 105 Mich. 382, 63 N. W. 437; *Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; *Vermont Sav. Bank v. Elliott*, 53 Mich. 256, 18 N. W. 805.

Minn.—*Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637; *Horton v. Kelly*, 40 Minn. 193, 41 N. W. 1031; *Furman v. Tenny*, 28 Minn. 77, 9 N. W. 172; *Morrison v. Abbott*, 27 Minn. 116, 6 N. W. 455.

Miss.—*Wilcher v. Thompson* (1893), 12 So. 828; *Hodges v. Hickley*, 67 Miss. 715, 7 So. 404; *O'Conner v. Ward*, 60 Miss. 1025.

Mo.—*Reed Bros. v. Nicholson*, 189 Mo. 396, 88 S. W. 71; *Stam v. Smith*, 183 Mo. 464, 81 S. W. 1217; *Spratt v. Early*, 169 Mo. 357, 69 S. W. 13; *Moore v. Wilkerson*, 169 Mo. 334, 68 S. W. 1035; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 967; *Grimes v. Portman*, 99 Mo. 229, 12 S. W. 792; *Muenks v. Bunch*, 90 Mo. 500, 3 S. W. 63; *Davis v. Land*, 88 Mo. 436.

Neb.—*Wheatley v. Chamberlain Banking House* (1904), 101 N. W. 1135; *National Bank of Commerce v. Chamberlain* (1904), 100 N. W. 943; *Brown v. Campbell* (1903), 93 N. W. 1007; *Plummer v. Rohman*, 62 Neb. 145, 84 N. W. 600, 87 N. W. 11; *Smith v. Neufeld*, 61 Neb. 699, 85 N. W. 898; *Mundt v. Hagadorn*, 49 Neb. 409, 68 N. W. 610; *Munson v. Carter*, 40 Neb. 417, 58 N. W. 931.

Nev.—*Bailey v. Littell*, 24 Nev. 294, 53 Pac. 308.

N. M.—*Heisch v. Bell* (1902), 70 Pac. 572.

N. C.—*Dortch v. Benton*, 98 N. C.

the grantor therein,⁵⁵ although, in some cases, it is held that the homestead exemption may be forfeited or lost by a conveyance

190, 3 S. E. 638, 2 Am. Rep. 331; Crummen v. Bennet, 68 N. C. 494.

N. D.—Dalrymple v. Security Imp. Co., 11 N. D. 65, 88 N. W. 1033; Olson v. O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

Ohio.—Prosek v. Kuchta, 9 Ohio Dec. 129, 11 Cinc. L. Bul. 65; Stewart v. Wooley, 2 Ohio Dec. 341, 2 West. L. Month. 471.

S. C.—McNair v. Moore, 64 S. C. 82, 41 S. E. 829; Barrow v. Williams, 58 S. C. 280, 36 S. E. 561, 79 Am. St. Rep. 840; Aultman v. Salinas, 44 S. C. 299, 22 S. E. 465.

S. D.—Commercial Nat. Bank v. Kendall (1906), 106 N. W. 53.

Tex.—Jolly v. Diehl (Civ. App. 1905), 86 S. W. 965; King v. Harter, 70 Tex. 579, 8 S. W. 308; Scheuber v. Ballow, 64 Tex. 166; Martel v. Somers, 26 Tex. 551; Wood v. Chambers, 20 Tex. 247, 70 Am. Dec. 382; Heidelberg v. Carter, 34 Tex. Civ. App. 579, 79 S. W. 346; Finn v. Kent, 13 Tex. Civ. App. 36, 34 S. W. 1013; Brown v. Moore (Civ. App. 1901), 64 S. W. 781.

Vt.—Darling v. Ricker, 68 Vt. 471, 35 Atl. 376; Pease v. Shirlock, 63 Vt. 622, 22 Atl. 661; Premo v. Hewitt, 55 Vt. 362; Prout v. Vaughn, 52 Vt. 451; Danforth v. Beattie, 43 Vt. 138; Jewett v. Guyer, 38 Vt. 209.

Va.—Mahoney v. James, 94 Va. 176, 26 S. E. 384; Williams v. Lord, 75 Va. 390.

Wis.—Bank of Commerce v. Fowler, 93 Wis. 241, 67 N. W. 423; Rozek v. Redzinski, 87 Wis. 525, 58 N. W. 262; Shawano County Bank v. Koepen, 78 Wis. 533, 47 N. W. 723; Hoffman v. Junk, 51 Wis. 613, 8 N. W.

493; Pike v. Miles, 23 Wis. 164, 99 Am. Dec. 148.

Wyo.—North Platte Milling, etc., Co. v. Price, 4 Wyo. 293, 33 Pac. 664.

Where tenants in common occupy land as a homestead, a conveyance by one of them of his interest therein to his co-tenant is not void as to their creditors, though it be without consideration. Fordyce v. Hicks, 80 Iowa, 272, 45 N. W. 750. And where a tenant in common of a homestead conveys his interest therein to his adopted children, who had lived with him and rendered him valuable service, such conveyance cannot be set aside as fraudulent as to his creditors. Eagle v. Smylie, 126 Mich. 612, 85 N. W. 1111, 86 Am. St. Rep. 562.

Where a debtor takes title in the name of his wife of real estate acquired as a homestead, the fact that other property owned by him, and more than sufficient to pay his debts, was his homestead prior to the purchase, does not render it fraudulent as to his creditors. Lang v. Williams, 166 Mo. 1, 65 S. W. 1012.

Where the equity of redemption in a homestead is worth less than one thousand dollars, its conveyance is not fraudulent as against the creditors of the grantor. Palmer v. Bray (1904), 98 N. W. 849, 10 Det. L. N. 974; Balz v. Nelson, 171 Mo. 682, 72 S. W. 527.

Where a tract of land, including a homestead, is subject to a mortgage and judgments for a sum larger than the value of the portion of the land which is not included in

made with intent to hinder, delay, or defraud creditors.⁵⁶ The title of the purchaser or grantee of a homestead, as against the creditors of his grantor, is not affected by the grantor's purpose

the homestead, a voluntary conveyance by the owner to his wife is not fraudulent. *Stubblefield v. Gadd*, 112 Iowa, 681, 84 N. W. 917.

Equitable mortgage.—Since a debtor's homestead is not subject to the claims of creditors, an absolute conveyance of it for the purpose of placing it beyond their reach does not preclude him from having the deed declared a mortgage, if the circumstances justify such relief. *Patnode v. Darveau*, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095; *O'Connor v. Ward*, 60 Miss. 1025, 1037.

Agricultural homestead. — A debtor may, although not residing upon an agricultural homestead, increase it to the maximum area, in order to protect a conveyance from being adjudged fraudulent as against creditors. *Wilks v. Vaughan* (Ark. 1904), 83 S. W. 913.

The good faith of a husband in deeding a homestead to his wife cannot be inquired into by a creditor of the husband. *Merchants' Nat. Bank v. Kopplin*, 1 Kan. App. 599, 42 Pac. 263; and other cases cited above, this note.

55. U. S.—*Farwell v. Kerr*, 28 Fed. 345; *McFarland v. Goodman*, 16 Fed. Cas. No. 8,789, 6 Biss. 111.

Ala.—*Kennedy v. First Nat. Bank*, 107 Ala. 170, 18 So. 396, 36 L. R. A. 308.

Ark.—*Carmack v. Lovett*, 44 Ark. 180.

Ill.—*Quinn v. People*, 146 Ill. 275, 34 N. E. 148; *Ammondson v. Ryan*, 111 Ill. 506; *Bell v. Devore*, 96 Ill. 217; *Leupod v. Krause*, 95 Ill. 440;

Hartwell v. McDonald, 69 Ill. 293; *Redden v. Potter*, 16 Ill. App. 265.

Ky.—*Kuevan v. Specker*, 11 Bush. 1.

Mass.—*Castle v. Palmer*, 6 Allen, 401.

Minn.—*Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77.

Miss.—*Edmonson v. Meachan*, 50 Miss. 34. Where, after a conveyance of land by a husband to his wife has been adjudged fraudulent as to certain creditors of the husband, he moves on to the land with his family, and makes it his home, he is entitled to homestead rights therein, and a sale thereof under such judgment should be enjoined. *Dulion v. Harkness*, 80 Miss. 8, 31 So. 416, 92 Am. St. Rep. 663.

Mo.—*State v. Diveling*, 66 Mo. 375; *Vogler v. Montgomery*, 54 Mo. 577.

Neb.—*Stubendorf v. Hoffman*, 23 Neb. 360, 36 N. W. 581.

N. C.—*Rankin v. Shaw*, 94 N. C. 405; *Arnold v. Estis*, 92 N. C. 162.

Ohio.—*Roig v. Schults*, 42 Ohio St. 165; *Bills v. Bills*, 41 Ohio St. 196; *Sears v. Hanks*, 14 Ohio St. 298, 84 Am. Dec. 378.

S. C.—*Wood v. Timmerman*, 29 S. C. 175, 7 S. E. 74.

Tex.—*Beard v. Blum*, 64 Tex. 59.

Va.—*Hatcher v. Crews*, 83 Va. 371, 5 S. E. 221; *Marshall v. Sears*, 79 Va. 49; *Boynton v. McNeal*, 31 Gratt. 456; *Shipe v. Repass*, 28 Gratt. 716. *Compare* *Rose v. Sharpless*, 33 Gratt. 153.

Wis.—*Murphy v. Crouch*, 24 Wis. 365.

56. U. S.—*Minor v. Wilson*, 58

in making the conveyance.⁵⁷ The motive may be bad but the act is not illegal.⁵⁸ No fraud can be predicated of the conveyance of a homestead,⁵⁹ since the creditor has no right to look to property so exempted.⁶⁰ It is only by disposing of such of his property as his creditors have a legal right to look to for the satisfaction of their claims that a debtor can commit a fraud upon his creditors, and therefore he cannot defraud them by disposing of his homestead.⁶¹ The conveyance of a homestead even though made for the purpose of avoiding the payment of the grantor's debts, and with intent to defraud creditors is not fraudulent as to creditors, since the debtor may deal as he pleases with exempt property.⁶² A fraudulent conveyance does not enlarge the rights of creditors, but merely leaves them to enforce their rights as if no conveyance had been made.⁶³ The voluntary conveyance made by a husband to his wife of the proceeds of a sale of their homestead, or a gift by a husband to his wife of such proceeds as an inducement to her to join in the sale, is not fraudulent as to creditors.⁶⁴ The sale of his homestead by a

Fed. 616; *Pratt v. Burr*, 19 Fed. Cas. No. 11,372, 2 Biss. 36.

Ark.—*Chambers v. Sallie*, 29 Ark. 407.

Minn.—*Piper v. Johnston*, 12 Minn. 60.

N. H.—*Currier v. Sutherland*, 54 N. H. 475, 20 Am. Dec. 143.

S. D.—*Kettleschlager v. Ferrick*, 12 S. D. 455, 81 N. W. 889, 76 Am. St. Rep. 623.

Tenn.—*Nichol v. Davidson County*, 8 Lea, 389. *Compare Ruohs v. Hooke*, 3 Lea, 302, 31 Am. Rep. 642.

Wis.—*Barker v. Dayton*, 28 Wis. 367.

Where money is obtained by a loan on the homestead standing in the name of the wife, a purchase of personalty in the name of the wife, paid for by a portion of the money so obtained, is not fraudulent as to the

creditors of the husband. *Farmers' Trust Co. v. Linn*, 103 Iowa, 159, 72 N. W. 496.

57. *Roser v. Fourth Nat. Bank*, 56 Kan. 129, 42 Pac. 341.

58. *Bogan v. Cleveland*, 52 Ark. 101, 12 S. W. 159, 20 Am. St. Rep. 158.

59. *Gibson v. Barrett* (Ark. 1905), 87 S. W. 435.

60. *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254.

61. *Hixon v. George*, 18 Kan. 253.

62. *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697; *Jolly v. Diehl* (Tex. Civ. App. 1905), 86 S. W. 965.

63. *Keuvan v. Specker*, 11 Bush (Ky.), 1.

64. *Cal.*—*Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

Mo.—*Harris v. Meredith*, 106 Mo. App. 586, 81 S. W. 203.

debtor and the investment of the proceeds in other lands, or the conveyance by the debtor to his wife or another of real estate received in exchange for the homestead, is not fraudulent as against creditors.⁶⁵ But where the land was not at the time of its conveyance exempt because of the debtor's failure to select, occupy, or claim the same as a homestead,⁶⁶ or because of its abandonment by the debtor as a homestead,⁶⁷ a conveyance thereof

Tex.—Blum v. Light, 81 Tex. 414, 16 S. W. 1090; Gatewood v. Scurlock, 2 Tex. Civ. App. 98, 21 S. W. 55; Montgomery v. Brown, 1 Tex. App. Civ. Cas., § 1305; Allen v. Hall, 1 Tex. App. Div. Cas., § 1279.

Vt.—Keyes v. Rines, 37 Vt. 260, 76 Am. Dec. 707.

65. *Iowa.*—Jones v. Brandt, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310; Officer v. Evans, 48 Iowa, 557.

Kan.—Winter v. Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331.

Ky.—Whitt v. Kendall, 11 Ky. L. Rep. 116, 11 S. W. 592.

Mo.—Stinde v. Behrens, 81 Mo. 254.

Neb.—Scheel v. Lackner, 4 Neb. (Unoff.) 221, 93 N. W. 741.

66. *Ark.*—Reeves v. Slade, 71 Ark. 611, 77 S. W. 54.

Cal.—La Point v. Blanchard, 101 Cal. 549, 36 Pac. 98, and the fact that the property is of such a nature that it could, and probably would, have been set aside to the debtor as a homestead, does not render the conveyance any the less a fraud on creditors.

Ind.—Phoenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. 270.

Mo.—Stewart v. Stewart, 65 Mo. App. 603, such selection cannot be made after the sale of the property.

N. H.—Currier v. Sutherland, 54 N. H. 475, 20 Am. Rep. 143.

Tex.—Gaines v. National Exch. Bank, 64 Tex. 18, and where the

transfer is made before judgment on a debt existing at the time, the debtor cannot defeat the rights of a creditor by securing a reconveyance of the land. .

The right of exemption of a homestead in Alabama attaches without any act on the part of the exemptioner, as if the particular property were specially claimed and designated as exempt, where the area and value of the homestead do not exceed the limit allowed as exempt, and it is not a part or parcel of a larger portion of land. Pollack v. McNeil, 100 Ala. 203, 13 So. 937.

67. *U. S.*—Thompson v. McConnell, 107 Fed. 33, 46 C. C. A. 124.

Ark.—Chambers v. Sallie, 29 Ark. 407.

Iowa.—Belden v. Younger, 76 Iowa, 567, 41 N. W. 317.

Miss.—Edmonson v. Meacham, 50 Miss. 34.

Neb.—Edwards v. Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. St. Rep. 607.

N. H.—Currier v. Sutherland, 54 N. H. 475, 20 Am. Rep. 143.

S. D.—Kettleschlager v. Ferrick, 12 S. D. 455, 81 N. W. 889, 76 Am. St. Rep. 623, a transfer of the homestead from husband to wife, without consideration, to prevent creditors from subjecting such premises to the satisfaction of their claims, in case the debtor should remove therefrom,

is within the statute in relation to fraudulent conveyances and invalid as to creditors of the debtor. A debtor forfeits his rights under the homestead law by a conveyance to defraud his creditors, where, by statute, their judgments would be a lien on the land.⁶⁸ The statutes usually permit a change of homesteads, and the owner of a homestead may acquire an entirely new homestead on a sale of the old and a reinvestment of the proceeds.⁶⁹ The homestead being a limited estate under certain statutes, there may be a fraudulent conveyance of the homestead by the party entitled thereto so far as the fee after the expiration of the limited estate is concerned, and the fee in the homestead may

and with other funds purchase and occupy other premises as a homestead, is fraudulent as to creditors.

Tex.—Taylor v. Ferguson, 87 Tex. 1, 26 S. W. 46; Baines v. Baker, 60 Tex. 139, a conveyance of homestead by husband to wife, after its abandonment, to protect it from the claims of creditors, is fraudulent as to the husband's creditors, and will be annulled at their instance; Cox v. Shropshire, 25 Tex. 113; Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; Rives v. Stephens (Tex. Civ. App.), 28 S. W. 707.

Wis.—Barker v. Dayton, 28 Wis. 367.

A homestead is not abandoned unless there is an intent to make a change of residence and an actual change. Mallard v. First Nat. Bank (Neb.), 59 N. W. 767; Edwards v. Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. St. Rep. 607. See also Carroll v. Dawson, 103 Ky. 736, 46 S. W. 222, 20 Ky. L. Rep. 349; Willis v. Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

The legal title to a homestead descends, on the death of the owner intestate, to his widow and children, and gives such children a valuable in-

terest, which they cannot convey in fraud of their creditors; and a voluntary conveyance of its interest therein by a child not occupying it to the widow who continues to occupy it, in fraud of creditors of such child, will be set aside. Hollinger v. Boatman's Bank, 69 Kan. 519, 77 Pac. 263.

A court of equity will cancel a trust deed, at the instance of a creditor of one of the heirs of a grantor, where it was made without consideration and with intent to defraud the grantor's creditors, and was kept apparently alive after the grantor's death, with intent to defraud creditors of her heirs, by collusion between her heirs and her grantee. Dorroh v. Holberg (Miss.), 25 So. 661.

68. Piper v. Johnston, 12 Minn. 60.

69. In re Johnson (U. S. D. C. Iowa), 118 Fed. 312; Richards v. Orr, 118 Iowa, 724, 92 N. W. 655; Greene v. Root (U. S. D. C. Iowa), 62 Fed. 191; Winter v. Ritchie, 57 Kan. 212, 45 Pac. 595, 57 Am. St. Rep. 331; Harris v. Meredith (Mo. App.), 81 S. W. 203; Scheel v. Lackner, 4 Neb. (Unoff.) 221, 93 N. W. 741.

be subjected to the payment of the debts of its owner, subject to the homestead right.⁷⁰

§ 43. Homestead included in conveyance of other property.

—Where a debtor conveys lands which include property occupied by him as a homestead and exempt as such and other property which is not exempt, the conveyance is valid as to the homestead as against the creditors of the debtor, although void in respect to such other land. The creditors may reach the property so conveyed which is not exempt, if the conveyance thereof is fraudulent as to them.⁷¹ Where the property conveyed by the debtor is of greater area or value than the homestead exemption to which he is entitled under the statute, the excess in area or surplus in value over the exemption may be reached and subjected by his creditors.⁷² Where the property conveyed exceeds

70. *Chambers v. Sallie*, 29 Ark. 407; *Younger v. Ritchie*, 116 N. C. 782, 21 S. E. 911; *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378; *Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87; *Schaffer v. Beldsmeier*, 107 Mo. 314, 17 S. W. 797; *Kirksville Sav. Bank v. Spangler*, 59 Mo. App. 172. But see *Bank of Versailles v. Guthrey*, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621, overruling the preceding Missouri cases and holding that the homestead includes the fee and that they are not two separable and devisible interests.

71. *U. S.*—*Thompson v. McConnell*, 107 Fed. 33, 46 A. C. 124; *Farwell v. Kerr*, 28 Fed. 345.

Ill.—*Bell v. Devore*, 96 Ill. 217.

Neb.—*Brown v. Campbell* (1903), 93 N. W. 1007.

N. C.—*Crummen v. Bennet*, 68 N. C. 494.

S. C.—*McNair v. Moore*, 64 S. C. 82, 41 S. E. 829.

Tenn.—*Gibbs v. Patten*, 2 Lea, 180.

Tex.—*Freeman v. Hamblin*, 1 Tex.

Civ. App. 157, 21 S. W. 1019, a part of homestead included by mistake.

Vt.—*Danforth v. Beattie*, 43 Vt. 138.

72. *U. S.*—*Thompson v. McConnell*, 107 Fed. 33, 46 C. C. A. 124, excess inadvertently included.

Ark.—*Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783.

Ill.—*First Nat. Bank v. Rhea*, 155 Ill. 434, 40 N. E. 551; *Quinn v. People*, 146 Ill. 275, 34 N. E. 148; *Muller v. Inderreiden*, 79 Ill. 382.

Ky.—*Cincinnati Tobacco Warehouse Co. v. Matthews*, 24 Ky. L. Rep. 2445, 74 S. W. 242; *Wilson v. Calvert*, 15 Ky. L. Rep. 489, 24 S. W. 3.

Minn.—*Baldwin v. Rogers*, 28 Minn. 544, 11 N. W. 77.

Neb.—*Brown v. Campbell* (1903), 93 N. W. 1007; *Hicks v. Mack*, 19 Neb. 339, 27 N. W. 230.

N. C.—*Dortch v. Benton*, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331.

S. C.—*Aultman v. Salinas*, 44 S. C. 299, 22 S. E. 465.

the amount of the homestead exemption, the creditors can subject it and sell the entire tract, if indivisible, or allot the homestead to the extent of the exemption and subject the balance.⁷³

§ 44. **Crops grown on homestead.**—Where growing crops or crops grown on the homestead of a debtor are exempted by statute from levy and sale on execution, a conveyance of them cannot be fraudulent as against creditors.⁷⁴ Though growing crops, unless reserved, pass under a conveyance of the land, they are subject to levy and sale the same as other personal property; and, where a debtor conveys land which at the time is exempt as a homestead, without consideration or with intent to defraud creditors, the latter may subject to their claims the growing crops which were on the land at the time of the conveyance, where they are not exempted by statute.⁷⁵ But, although crops grown on the homestead owned by the husband are subject to his debts, the fact that a transfer of the homestead from the husband to the wife passes title to subsequent crops to her does not make such transfer fraudulent as to the husband's creditors, since it merely passes title to the land, the subsequent crops having no value in law.⁷⁶

§ 45. **Purchase of homestead and payment of liens.**—The

Vt.—*Danforth v. Beattie*, 43 Vt. 138.

Va.—*Hatcher v. Crews*, 83 Vt. 371, 5 S. E. 221.

Wis.—*Commerce Bank v. Fowler*, 93 Wis. 241, 67 N. W. 423; *Rozek v. Redzinski*, 87 Wis. 525, 58 N. W. 262.

Purchase money credited upon homestead allowance.—Where a fraudulent grantor is unlawfully paid a portion of the purchase money, and, in an action to marshal liens and for a sale on execution of grantor's remaining interest, an allowance in lieu of homestead is made

to such grantor, the amount so unlawfully paid may be credited upon such homestead allowance. *Johnson v. Burnside*, 7 Ohio N. P. 74, 8 Ohio S. & C. P. Dec. 412.

73. *Wilson v. Calvert*, 15 Ky. L. Rep. 489, 24 S. W. 3; *Doyle v. First Nat. Bank* (Tex. Civ. App.) 50 S. W. 480.

74. *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86, unpicked cotton growing on homestead.

75. *Erickson v. Patterson*, 47 Minn. 525, 50 N. W. 699.

76. *Olson v. O'Conner*, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595.

rule is well established that it is not fraudulent as against creditors, either existing or subsequent, for a debtor, although insolvent, to exercise his right to create a homestead out of his property, or to purchase, with his non-exempt money or other non-exempt property, other property with the intent to hold it as a homestead,⁷⁷ even though he procures the legal title to be invested in his wife.⁷⁸ The transfer by one partner, although in failing circumstances, of all his firm interest, constituting all his available assets, to his copartners, in exchange for a homestead, or other use of non-exempt partnership property in purchasing a homestead, is not a fraud upon creditors.⁷⁹ The rule does not apply as to existing creditors, where the statute does not exempt

77. U. S.—In re Wilson, 123 Fed. 20, 59 C. C. A. 100; In re Stone, 116 Fed. 35, moving into a building after insolvency and in contemplation of bankruptcy does not defeat the right to a homestead exemption therein; Kelly v. Sparks, 54 Fed. 70.

Ala.—Kelley v. Connell, 110 Ala. 543, 18 So. 9.

Cal.—Simonson v. Burr, 121 Cal. 582, 54 Pac. 87; Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198.

Colo.—McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420, 3 Am. St. Rep. 579.

Ill.—Cipperly v. Rhodes, 53 Ill. 346.

Kan.—Hixon v. George, 18 Kan. 253.

Mass.—Tucker v. Drake, 11 Allen, 145.

Mich.—Meigs v. Dibble, 73 Mich. 101, 40 N. W. 935.

Minn.—Jacoby v. Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52.

Miss.—Edmonson v. Meacham, 50 Miss. 34.

Neb.—Paxton v. Sutton, 53 Neb. 81, 73 N. W. 221, 68 Am. St. Rep. 589.

N. H.—Gove v. Campbell, 62 N. H. 401.

Tex.—Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; North v. Shearn, 15 Tex. 174; Finn v. Krut, 13 Tex. Civ. App. 36, 34 S. W. 1013.

Wis.—Kapernick v. Louk, 90 Wis. 232, 62 N. W. 1057.

Contra.—In re Boothroyd, 3 Fed. Cas. No. 1,652; Pratt v. Burr, 19 Fed. Cas. No. 11,372, 5 Biss. 36; In re Sauthoff, 21 Fed. Cas. No. 12,380, 8 Biss. 35; In re Wright, 30 Fed. Cas. No. 18,067, 3 Biss. 359.

78. U. S.—First Nat. Bank v. Glass, 79 Fed. 706, 25 C. C. A. 151; Backer v. Meyer, 43 Fed. 702.

Ala.—Reeves v. Peterman, 100 Ala. 366, 19 So. 512.

Ill.—Cipperly v. Rhodes, 53 Ill. 346.

Kan.—Monroe v. May, 9 Kan. 466.

N. H.—Gove v. Campbell, 62 N. H. 401. See also Discharge of mortgage on homestead, chap. XI, § 18, *infra*.

Contra.—Rogers v. McCauley, 22 Minn. 384; Sumner v. Sawtelle, 8 Minn. 309.

79. Bell v. Beazley, 18 Tex. Civ.

the homestead from liability for debts contracted before its acquisition.⁸⁰ On the principle of the rule first above stated, the creditors of a debtor cannot subject his homestead to the payment of their claims because the debtor, while insolvent, appropriated money or other property in his hands to the payment of a debt which was a lien on the homestead, by mortgage or otherwise.⁸¹

§ 46. **Improvements.**—The fact that a person, knowing himself to be insolvent, invests money in improvements on his homestead, so as to keep it from his creditors, will not prevent the exemption of the homestead from forced sale for payment of his debts, or subject such improvements to the claims of his creditors, where the value does not exceed the exemption,⁸² unless there is a statutory provision to the contrary.⁸³ The head of a family, although insolvent and largely indebted, may invest his money or property in homestead improvements to any extent, and have the same exempt from execution, under the provisions of the Texas constitution, placing no limit on the value of such improvements.⁸⁴

App. 639, 45 S. W. 401. See also *Blanchard v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474; *Hunnicutt v. Summey*, 63 Ga. 586. *Contra.*—In re Boothroyd, *supra*; In re Sauthoff, *supra*.

80. *Fish v. Hunt*, 81 Ky. 584, a debtor will not be permitted to expend his money in improving land which he has never occupied as a homestead, to the injury of creditors whose claim existed prior to the expenditure.

81. *U. S.*—In re *Wilson*, 123 Fed. 20, 59 C. C. A. 100; In re *Henkel*, 11 Fed. Cas. No. 6,362, 2 Sawy. 305.

Ark.—*Flash v. Tindall*, 39 Ark. 571.

Cal.—*Randall v. Buffington*, 10 Cal. 491.

Kan.—*Sproul v. Atchison Nat. Bank*, 22 Kan. 336.

Wash.—*Bradley v. Gotzian*, 12 Wash. 71, 40 Pac. 623.

Wis.—*Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341.

82. *Kelly v. Sparks*, 54 Fed. 70; In re *Parks*, 18 Fed. Cas. No. 10,765; *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742, *rev'g* 29 S. W. 418.

83. *Fish v. Hunt*, 81 Ky. 584; *Butler v. Davis*, 15 Ky. L. Rep. 273, 23 S. W. 220. Compare *Nichols v. Sennitt*, 78 Ky. 630; *Thomas v. Lucas* (Ky. 1898), 45 S. W. 68.

84. *Chase v. Swayne*, *supra*.

§ 47. **Insurance on homestead.**—It is not a fraud upon creditors, under the homestead law, for a debtor to use his means to procure insurance upon his homestead.⁸⁵ Insurance money derived from a policy on homestead improvements, which under the Texas constitution are exempt from forced sale, is likewise exempt, and the amount of money derived from such an insurance policy which may be protected from the owner's debts cannot be limited to an amount reasonably sufficient to build a house for the family to live in, there being no limit on the value of improvements which shall be exempt.⁸⁶

§ 48. **Change in character of property and following proceeds.**—The property of a debtor, as a general rule, cannot be placed beyond the reach of his creditors by changing its form or character, or by substituting other property, since the substituted property will stand in the place of the property fraudulently conveyed and be liable in the same manner to the creditors of the vendor.⁸⁷ For example, though one may give away exempt property, his creditors may attack as fraudulent a transaction by which he sells exempt property and with the proceeds buys non-exempt property, taking title in another to put it beyond the reach of his creditors.⁸⁸ Where property fraudulently conveyed has been transferred to a corporation in exchange for corporate stock, such stock is subject to the claims of the grantor's creditors.⁸⁹ The defrauded creditor may either affirm the sale and

85. *Bernheim v. Davitt*, 9 Ky. L. Rep. 229, 5 S. W. 193.

86. *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742, *rev'd* 29 S. W. 418, insurance money on costly house as a homestead held exempt to the extent of \$60,000.

87. *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Brown v. Matthaus*, 14 Minn. 205; *Fleury v. Pringle*, 26 Grant Ch. (U. C.) 67; and other cases cited in the following notes.

See, as to Property purchased in the name of a third person, chap. II, § 5, *supra*, chap. IV, § 29, *supra*; as to Improvements on property of third person, chap. II, § 8, *supra*, chap. IV, § 24, *supra*; as to Change to exempt property, chap. IV, § 41, *supra*.

88. *McLeod v. McLeod*, 28 Ky. L. Rep. 284, 89 S. W. 199, 90 S. W. 5.

89. *Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, *aff'd* 22 Ill. App. 538.

go for the price, or he may impeach it as fraudulent and follow the goods or their proceeds.⁹⁰ A creditors' suit will lie to reach personal property fraudulently transferred, and it will bind other articles purchased to supply the waste of ordinary wear and tear.⁹¹ A complaining creditor has the right to follow the fund or proceeds of a fraudulent sale or conveyance into any property in which it may have been invested, so far as it can be traced, and into the possession of any person not a *bona fide* owner or holder thereof.⁹² The proceeds of sales under fraudu-

90. *Nicholson v. Leavitt*, 6 N. Y. Super. Ct. 252, but he cannot hold the buyer liable for the proceeds when he has received neither.

91. *McCloskey v. Stewart*, 63 How. Pr. (N. Y.) 137.

92. *N. Y.*—*Mandeville v. Avery*, 124 N. Y. 376, 29 N. E. 951, 21 Am. St. Rep. 678, *rev'g* 57 Hun, 78, 10 N. Y. Supp. 323; *Durand v. Hankerson*, 39 N. Y. 287, the court may order the payment of a mortgage, given by the grantee for the price, to a receiver, to be applied on plaintiff's judgment; *Lawrence v. Bank of Republic*, 35 N. Y. 320; *McConihe v. Derby*, 62 Hun, 90, 16 N. Y. Supp. 474; *Hedges v. Polhemus*, 9 Misc. Rep. 680, 30 N. Y. Supp. 556. *Compare* *McCaffrey v. Hickey*, 66 Barb. 489; *Henderson v. Brooks*, 3 Thomps. & C. 445.

U. S.—*Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786.

Ala.—*Metcalf v. Arnold* (1902), 32 So. 763; *Weingarten v. Marcus*, 121 Ala. 187, 25 So. 852; *Birmingham Shoe Co. v. Torrey*, 121 Ala. 89, 25 So. 763; *Dickinson v. National Bank of Republic*, 98 Ala. 546, 14 So. 550; *Bryant v. Young*, 21 Ala. 264; *Carville v. Stout*, 10 Ala. 796.

Ark.—*Bryant-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073.

Colo.—*Forrester v. Gill*, 11 Colo. App. 410, 53 Pac. 230.

Fla.—*Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632.

Ill.—*French v. Commercial Nat. Bank*, 199 Ill. 213, 65 N. E. 252, *aff'g* 97 Ill. App. 533; *Hall v. Stroufe*, 52 Ill. 421; *Steere v. Hoagland*, 50 Ill. 377, 39 Ill. 264.

Ind.—*Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593, where a husband having no property subject to execution, invests his funds in his wife's lands, colluding with her to defraud his creditors thereby, and his wife afterwards sells the land, and retains the proceeds, she will be regarded in equity as trustee for the husband's judgment creditors.

Iowa.—*Shumaker v. Davidson*, 116 Iowa, 569, 87 N. W. 441, but he cannot take both the land and the consideration therefor; *Davis v. Gibbon*, 24 Iowa, 257.

Ky.—*Treadway v. Turner*, 10 Ky. L. Rep. 949, 10 S. W. 816.

Me.—*Sparrow v. Chesley*, 19 Me. 79.

Mass.—*Robinson v. Bliss*, 121 Mass. 428.

lent judgments are within this rule.⁹³ But if the property has been destroyed by time or accident, or sold and delivered to an innocent person, for a valuable consideration,⁹⁴ or has been obtained in good faith by the creditors of the transferee on execution sale,⁹⁵ or has been reconveyed or paid over to the fraudulent grantor,⁹⁶ or to his other creditors,⁹⁷ the creditor's remedy is gone. So, where the judgment creditor has a plain and adequate remedy at law,⁹⁸ or his right to reach and subject the land or other

Mich.—Bresnahan v. Nugent, 92 Mich. 76, 92 N. W. 735; Kinter v. Pickard, 67 Mich. 125, 34 N. W. 535.

Miss.—Bernheim v. Beer, 56 Miss. 149; Edmonson v. Meacham, 50 Miss. 34; Carlisle v. Tindall, 49 Miss. 229.

Neb.—Selz v. Hocknell, 62 Neb. 101, 86 N. W. 905, 63 Neb. 503, 88 N. W. 767.

N. H.—Gutterson v. Morse, 58 N. H. 529; Coolidge v. Melvin, 42 N. H. 510.

Pa.—Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533.

Tenn.—Williamson v. Williams, 79 Tenn. 355.

Tex.—Schultze v. Schultze (Civ. App. 1901), 66 S. W. 56; Heath v. First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123, so far only as proceeds of a fraudulent conveyance of property go to the purchase of other lands by the fraudulent grantee can such lands be subjected to the debts of the grantor.

Va.—Burbridge v. Higgins, 6 Gratt. 119.

Wis.—Bank of Commerce v. Fowler, 93 Wis. 241, 67 N. W. 423.

Can.—Masuret v. Stewart, 22 Ont. 290. See also, as to Rights and liabilities of the grantee and those claiming under him, chap. XIV, § 24, *infra*.

93. Taggart v. Phillips, 5 Del. Ch. 237; French v. Commercial Nat.

Bank, 199 Ill. 213, 65 N. E. 252; Phelps v. Smith, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; Kohl v. Sullivan, 140 Pa. St. 35, 21 Atl. 247. See also Judgments, chap. II, § 10, *supra*.

94. Mandeville v. Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533; Richards v. Ewing, 30 Tenn. 327; Simpson v. Simpson, 26 Tenn. 275; and other cases cited in last preceding note. See also Rights and liabilities of bona fide purchasers from grantee, chap. XIV, § 54, *infra*.

95. Standard Nat. Bank v. Garfield Nat. Bank, 70 App. Div. (N. Y.) 46, 75 N. Y. Supp. 28. See also Rights and liabilities of grantees as to creditors, chap. XIV, § 24, *infra*.

96. Schneider v. Patton, 175 Mo. 684, 75 S. W. 155. See also Rights and liabilities of grantees as to creditors and subsequent purchasers, chap. XIV, §§ 24-48, *infra*.

97. Steere v. Hoagland, 50 Ill. 377; Kitts v. Willson, 140 Ind. 604, 39 N. E. 313. See also Rights and liabilities of grantees as to creditors and subsequent purchasers, chap. XIV, §§ 24-48, *infra*.

98. Davis v. Yonge (Ark. 1905), 85 S. W. 90. See also Remedies in equity, chap. XV, § 23, *infra*.

property conveyed in fraud of creditors is barred by his laches or by the statute of limitations,⁹⁹ he cannot sue to subject other land or property purchased with the property originally conveyed or the proceeds of said property. The creditor cannot reach and subject to the payment of his claim money or property which is the result of the capital or labor of the grantee, although applied in the use of the property fraudulently transferred.¹ The fact that the purchase of a store and stock of goods is constructively fraudulent does not affect the title of the purchaser to other goods which he has afterwards purchased with the proceeds of sales from the store and put into the stock, and they cannot be reached and subjected by creditors.² It has been held that the statutes of Elizabeth and similar statutes enable creditors to subject the specific property fraudulently conveyed, while in the hands of the fraudulent donee or vendee, to the satisfaction of their claims, but they do not enable them to subject the proceeds of a sale of the property, or other property purchased therewith, since the statutes only apply to property conveyed by the debtor, and, therefore, any trust resulting in favor of the creditors of the debtor must be worked out in equity, and the remedy of the creditors to reach such proceeds or property is in equity.³

§ 49. **Stock in trade sold in bulk.**—Where a sale of merchandise in bulk is not in compliance with a statute requiring notice to creditors of a proposed sale, it is void as to creditors on the ground of fraud, and a creditor of the vendor may proceed by attachment against his fraudulent vendor.⁴ Such a statute has been

99. *Mickel v. Walraven*, 92 Iowa, 423, 60 N. W. 633.

1. *Peters v. Light*, 76 Pa. St. 289. See also *Crops and other products*, chap. IV, § 25, *supra*.

2. *Capron v. Porter*, 43 Conn. 383; *Lucas v. Birdsey*, 41 Conn. 357.

3. *Kinter v. Pickard*, 67 Mich. 125, 34 N. W. 535; *Henderson v. Hoke*, 21

N. C. 119; *Richards v. Ewing*, 30 Tenn. 327; *Tubb v. Williams*, 26 Tenn. 355.

4. *W. B. Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460; *Carstarphen Warehouse Co. v. Fried*, 124 Ga. 544. A sale by a storekeeper at private sale of all but a few dollars' worth of the balance of

held to apply to the sale of a stock of goods by a debtor to a creditor in extinguishment of his debt, and a sale made in disregard of the act to be fraudulent and void as against other creditors of the common debtor.⁵ On the other hand it has been held that where the stock of a debtor transferred to a creditor was insufficient to satisfy the creditor's debt, there was no occasion for the creditor's demanding an affidavit and list of creditors as provided by a statute regulating sales in bulk.⁶ Where the sale and delivery of goods is not a sale in bulk outside of the ordinary course of business, prohibited by the statute, and the buyer is a purchaser for value and in good faith, the transaction cannot be impeached by the seller's creditors.⁷ The purchaser of a stock of goods in bulk without complying with the provisions of the statute becomes a trustee of the property purchased and responsible to the seller's creditors for the disposition of it.⁸ A sale of all the property belonging to a livery stable business has been held not to be a sale of goods, wares, and merchandise within the meaning of such a statute,⁹ and a sale by a saloonkeeper, holding a lease of a saloon for a year, with the right to renew the same from year to year so long as he bought beer from the landlord who owned the building and fixtures, of his business and stock of goods, has been held not to be a sale of a stock of merchandise in bulk within the meaning of such a statute.¹⁰ But the sale of a drug store and business conducted as a business separate and in-

his stock, after selling at auction part of it, is within the statute. *Fitz Henry v. Hunter*, 33 Wash. 629, 74 Pac. 1003.

A seller of goods does not become a creditor of the buyer within the meaning of the statute until the goods sold or a portion of them have been delivered. *Hardwick v. Gettier*, 43 Wash. 644, 86 Pac. 943.

5. *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 56 S. E. 488.

6. *Petersen v. Doak* (Wash. 1906), 86 Pac. 663, since an individual,

though insolvent or in failing circumstances, is entitled to pay or secure one of his creditors to the exclusion of others, even if in so doing he exhausts the whole of his property.

7. *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286.

8. *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199.

9. *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905.

10. *Pritz v. Jones*, 117 App. Div. (N. Y.) 643, 102 N. Y. Supp. 549.

dependent from a general store conducted by the debtor,¹¹ and the sale of the business and appliances of a boarding house and restaurant,¹² has been held within the provisions of such a statute. Such a statute has been held not to apply to a merchant's fixtures not intended for sale in the usual course of his business,¹³ to a cash register which is not a part of the goods kept for sale,¹⁴ or to the sale of the entire product of a bakery, the business being such as to require frequent sales of the entire stock in order to prevent the product becoming stale and unsalable.¹⁵ Such a statute has no application to a sale of a stock of goods under a duly recorded mortgage of the stock, given for a valuable consideration and free from fraud.¹⁶ Such statutes apply to and protect all the creditors of the vendor,¹⁷ but a sale by a partnership, without compliance with the terms of the statute, although void as against firm creditors, is not void as against the creditors of a partner.¹⁸ Such statutes are not to be construed as simply casting the burden of proving the good faith of the transaction on the purchaser, but are to be construed as meaning that noncompliance by the purchaser with the provisions of the act shall make the sale voidable as to creditors without regard to the intent of the parties to it.¹⁹

11. *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600.

12. *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784, and a failure to comply therewith renders the sale invalid as to the seller's creditors.

13. *Gallus v. Elmer*, 193 Mass. 106, 78 N. E. 772; *Kolander v. Dunn* (Minn. 1905), 104 N. W. 371, 483. *Contra*, *W. B. Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460, bar fixtures, desks, cash registers, pool tables, refrigerators and the like, used in connection with the business in which they are appropriate, are a part of a "stock of goods, wares and merchandise" within the meaning of the statute.

14. *Kent v. Liverpool, etc., Ins. Co.*,

26 Ind. 294, 89 Amer. Dec. 463; *Van Patten & Marks v. Leonard*, 55 Iowa, 520, 8 N. W. 334; *Albrecht v. Cudihee* (Wash. 1905), 79 Pac. 628.

15. *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286.

16. *Wasserman v. McDonald*, 190 Mass. 326, 76 N. E. 959; *Hannah & Hogg v. Richter Brewing Co.* (Mich. 1907), 112 N. W. 713. But see *Calkins v. Howard* (Cal. App. 1905), 83 Pac. 280.

17. *Eklund v. Hopkins*, 36 Wash. 179, 78 Pac. 787.

18. *Whitehouse v. Nelson* (Wash. 1906), 86 Pac. 174.

19. *Wilson v. Edwards*, 32 Pa. Super. Ct. 295.

CHAPTER V.

WHO MAY ATTACK VALIDITY OF CONVEYANCE.

- Section 1. Persons who may attack conveyance generally.
2. Pre-existing creditors.
 3. Subsequent creditors.
 4. Effect of fraud as to pre-existing creditors.
 5. Effect of prior and continuing indebtedness.
 6. Knowledge or notice of fraudulent transactions.
 7. Creditors whose claims are barred or satisfied.
 8. Nature of claims of creditors.
 9. Claims for torts.
 10. Claims for alimony.
 11. Persons representing creditors.
 12. Receivers in supplementary proceedings.
 13. Sureties and endorsers.
 14. Purchasers at judicial sales.
 15. Officers levying attachment or execution.
 16. Personal representatives.
 17. Estoppel and waiver.
 18. Knowledge or assent.
 19. Affirmance or ratification.
 20. Participation.
 21. Receipt of benefit under conveyance.
 22. Subsequent purchasers in general.
 23. Who are subsequent purchasers.
 24. Bona fide purchasers for value.
 25. Effect of notice.

Section 1. Persons who may attack conveyance generally.— Since the statute of 13 Elizabeth and statutes based thereon avoid conveyances made to hinder, delay, or defraud creditors only as against those intended to be hindered, delayed, or defrauded, and no others are within its protection, a conveyance made in fraud of creditors is valid as to all other parties,¹ and can be attacked and impeached only by creditors, or those who hold the rights of creditors.² A creditor cannot maintain an

1. See Rights and liabilities of parties and purchasers—original parties, chap. XIV, *infra*.

2. N. Y.—Graser v. Stellwagen, 25 N. Y. 315, the question of fraud cannot be raised by one claiming ad-

action to set aside a conveyance as fraudulent, unless he shows that he has been injured thereby by losing his remedy at law, or by the fact that the same has been rendered unavailing or

versely to the sale, who does not by the pleadings show himself to be a creditor or purchaser; *Newton v. Manwarring*, 56 Hun, 645, 10 N. Y. Supp. 347; *Butler v. Viele*, 44 Barb. 166; *Clute v. Fitch*, 25 Barb. 428.

U. S.—*Voorheis v. Blanton*, 89 Fed. 885, 32 C. C. A. 384.

Ala.—*Grisham v. Bodman*, 111 Ala. 194, 20 So. 514; *Anderson v. Anderson*, 64 Ala. 403, the term "creditors," as used in the Alabama statute, construed.

Ark.—*King v. Clay*, 34 Ark. 291; *Jordan v. Fenko*, 13 Ark. 593.

Cal.—*Brown v. Cline*, 109 Cal. 156, 41 Pac. 862; *Sexey v. Adkinson*, 34 Cal. 346, 91 Am. Dec. 698; *Labish v. Hardy*, 23 Pac. 123.

Ill.—*City of Chicago v. McGraw*, 75 Ill. 566; *Currier v. Ford*, 26 Ill. 488.

Ind.—*Clendening v. Ohl*, 118 Ind. 46, 20 N. E. 639; *Etter v. Anderson*, 84 Ind. 333; *Bentley v. Dunkle*, 57 Ind. 374; *O'Neil v. Chandler*, 42 Ind. 471.

Ky.—*Jones v. Hill*, 72 Ky. 692; *Warren v. Hall*, 36 Ky. 450; *Anderson v. Bradford*, 28 Ky. 69.

La.—*Johnson v. Mayor*, 30 La. Ann. 1203; *Keane v. Goldsmith*, 14 La. Ann. 349.

Me.—*Hatch v. Bates*, 54 Me. 136; *Thompson v. Moore*, 36 Me. 47; *Woodman v. Bodfish*, 25 Me. 317.

Mass.—*Perry v. Hayward*, 66 Mass. 344.

Mich.—*Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *McAuliffe*

v. Farmer, 27 Mich. 76; *Morey v. Forsyth*, Walk. 465.

Miss.—*Shaw v. Millsaps*, 50 Miss. 380; *Whitney v. Freeland*, 26 Miss. 481.

Mo.—*Larimore v. Tyler*, 88 Mo. 661; *McLaughlin v. McLaughlin*, 16 Mo. 242.

Neb.—*Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

N. J.—*Evans v. Herring*, 27 N. J. L. 243; *Garretson v. Kane*, 27 N. J. L. 208.

N. C.—*Smith v. Bowen*, 3 N. C. 296, there must be a creditor to be defrauded.

Ohio.—*Burgett v. Burgett*, 1 Ohio, 469, 13 Am. Dec. 634; *Union Cent. L. Ins. Co. v. Eckert*, 5 Ohio Dec. 528, 6 Am. L. Rec. 452.

Pa.—*Phipps v. Boyd*, 54 Pa. St. 342; *Brown v. Scott*, 51 Pa. St. 357.

R. I.—*Hudson v. White*, 17 R. I. 519, 23 Atl. 57.

S. C.—*Swanzy v. Hunt*, 2 Nott & M. 211; *Kid v. Mitchell*, 1 Nott & M. 334, 9 Am. Dec. 702.

Tenn.—*Bayless v. Elcan*, 41 Tenn. 96.

Tex.—*Shields v. Ord* (Civ. App. 1899), 51 S. W. 298; *Texarkana Nat. Bank v. Hall* (Civ. App. 1895), 30 S. W. 73.

Vt.—*Boutwell v. McClure*, 30 Vt. 674, must be a *bona fide* creditor.

Wis.—*Remington v. Willard*, 15 Wis. 646; *Norton v. Kearney*, 10 Wis. 443; *Schettler v. Brunette*, 7 Wis. 197; *Eaton v. White*, 2 Wis. 292.

Eng.—*Strong v. Strong*, 18 Beav. 408, 52 Eng. Reprint, 161.

otherwise.³ But the fact that the complainant had not expended money or altered his situation on the strength of defendant having any ownership in the property conveyed is not in itself sufficient to defeat complainant's right to relief.⁴ Since a fraudulent conveyance is voidable by those who are injured thereby, the only persons who can avoid a fraudulent conveyance are

3. N. Y.—Cushman v. Addison, 52 N. Y. 628; Fidelity Trust, etc., Co. v. Bell, 63 App. Div. 523, 71 N. Y. Supp. 651; Spicer v. Ayers, 53 How. Pr. 405; King v. Clarke, 2 Hill Eq. 611.

U. S.—Providence Sav. Bank v. Huntington, 10 Fed. 871.

Ala.—Pickett v. Pipkin, 64 Ala. 520.

Cal.—Harris v. Taylor, 15 Cal. 348.

Conn.—Graves v. Atwood, 52 Conn. 512, 52 Am. Rep. 610; Barney v. Cutler, 1 Root, 489.

Fla.—Howse v. Judson, 1 Fla. 133.

Ga.—Weed v. Davis, 25 Ga. 684.

Ill.—Mullen v. O'Shay, 85 Ill. App. 385.

Ind.—Emerson v. Opp, 139 Ind. 27, 38 N. E. 330; Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. 664, 22 Am. St. Rep. 649; Bentley v. Dunkle, 57 Ind. 374.

Kan.—Hunt v. Spencer, 20 Kan. 126; Bradley v. Larkin, 5 Kan. App. 11, 47 Pac. 315.

Ky.—Hanby v. Logan, 1 Duv. 242.

La.—Mendelsohn v. Blaise, 52 La. Ann. 1104, 27 So. 707; Willis v. Scott, 33 La. Ann. 1026; Meche v. Lalamie, 30 La. Ann. 1136; Berens v. Dupre, 6 La. Ann. 494; Le Blanc v. Dubroca, 6 La. Ann. 360; Wederstrandt v. Marsh, 11 Rob. 533; Lafleur v. Hardy, 11 Rob. 493.

Md.—Christopher v. Christopher, 64 Md. 583, 3 Atl. 296.

Mich.—Bodine v. Simmons, 38 Mich. 682.

Minn.—Johnston v. Piper, 4 Minn. 192.

Miss.—Edmunds v. Mister, 58 Miss. 765; Cowen v. Alsop, 51 Miss. 158; Henderson v. Thornton, 37 Miss. 448, 75 Am. Dec. 70; Everett v. Winne, Sm. & M. Ch. 67.

Mo.—Updegraff v. Theaker, 57 Mo. App. 45.

Neb.—Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890; Anthes v. Schroeder, 3 Neb. (Unoff.) 604, 92 N. W. 196.

N. C.—Arnett v. Wanett, 28 N. C. 41; Jones v. Young, 18 N. C. 352, 28 Am. Dec. 569.

Ohio.—Brannon v. Purcell, 8 Ohio Dec. 159, 6 Cinc. L. Bul. 67.

Pa.—Miner v. Warner, 2 Grant, 448.

S. C.—Buchanan v. McNinch, 3 S. C. 498.

Tenn.—Levis Zukoski, Mercantile Co. v. Bowers, 105 Tenn. 138, 58 S. W. 287; Burkey v. Self, 36 Tenn. 121.

Tex.—Walker v. Loring (Civ. App. 1896), 34 S. W. 405.

Vt.—Durkee v. Mahoney, 1 Aik. 116.

Wis.—Frei v. McMurdo, 101 Wis. 423, 77 N. W. 915.

See Prejudice to creditors, chap. III, § 9, *supra*. Remedies in equity, chap. XV, *infra*.

4. Iauch v. De Socarras, 56 N. J. Eq. 538, 39 Atl. 370.

those who might take the property from the grantor or from his heirs, if no conveyance had been made.⁵ It has been held also that fraud on a creditor not a party to the proceeding to set aside a conveyance cannot be set up. The question is whether, on all the facts, there was fraud as against the plaintiffs.⁶ A creditor cannot annul a sale, whose avoidance would exclusively benefit another creditor having priority by an anterior seizure.⁷ The creditors of a purchaser of personal property under a fraudulent sale cannot object thereto, the creditors of the owner being the only ones who have a right to complain.⁸

§ 2. **Pre-existing creditors.**—Any pre-existing or prior creditor, as a general rule, can take advantage of fraud in a conveyance and has the right to attack a conveyance made by a debtor as having been made in fraud of his creditors.⁹ Pre-existing creditors are those to whom the debtor

5. *Cook v. Lee*, 72 N. H. 569, 58 Atl. 511.

6. *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Steadman v. Hayes*, 80 Mo. 319.

7. *Lott v. Gray*, 6 Rob. (La.) 152.

8. *Bell v. Greenwood*, 21 Ark. 249; *O'Connell v. Cruise*, 12 Ohio Dec. 81, 1 Handy, 164.

9. N. Y.—*Dygert v. Remerschnider*, 32 N. Y. 629; *Wright v. Douglass*, 3 Barb. 554; *Botts v. Cozine*, 1 Hoff. Ch. 79.

U. S.—*Thompson Nat. Bank v. Corwine*, 89 Fed. 774.

Ala.—*Donley v. McKiernan*, 62 Ala. 34; *Jacobson v. Simmons*, 60 Ala. 185; *Snodgrass v. Decatur Branch Bank*, 25 Ala. 161, 60 Am. Dec. 505.

Ark.—*Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707.

Ill.—*Chicago Daily News Co. v. Siegel*, 212 Ill. 617, 72 N. E. 810; *Campbell, etc., Co. v. Ross*, 187 Ill.

553, 58 N. E. 596; *Highley v. American Exch. Nat. Bank*, 185 Ill. 565, 57 N. E. 436; *Springer v. Bingford*, 160 Ill. 495, 43 N. E. 751; *Croarkin v. Hutchinson*, 108 Ill. 633, 58 N. E. 678; *Wooldridge v. Gage*, 68 Ill. 157; *Moore v. Montelius*, 29 Ill. App. 197; *Ives v. Hulce*, 14 Ill. App. 389; *Shackleford v. Todhunter*, 4 Ill. App. 271.

Iowa.—*Babcock v. Hamilton*, 64 Iowa, 558, 21 N. W. 33; *Day v. Kendall*, 60 Iowa, 414, 14 N. W. 234; *Fifield v. Gaston*, 12 Iowa, 218; *Whitescarver v. Bonney*, 9 Iowa, 480.

Ky.—*Ahlering v. Speckman*, 30 Ky. L. Rep. 940, 99 S. W. 973; *Johnson v. Skaggs*, 8 Ky. L. Rep. 601, 2 S. W. 493.

La.—*Meche v. Lalamie*, 30 La. Ann. 1136; *Lopez v. Bergel*, 12 La. 197.

Me.—*American Agricultural Chemical Co. v. Huntington*, 99 Me. 361, 59 Atl. 515.

Md.—*Kipp v. Hanna*, 2 Bland, 26.

was indebted at the time of the fraudulent conveyance or other disposition of his property, although their claims may not have matured, or the particular form of the indebtedness may have been subsequently changed by being reduced to judgment or otherwise legally established.¹⁰ Creditors whose debts were con-

Mich.—Bodine v. Simmons, 38 Mich. 682.

Minn.—Irish v. Daniels, 100 Minn. 189, 110 N. W. 968; Schmitt v. Dahl, 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590; First Nat. Bank v. Burkhardt, 71 Minn. 185, 73 N. W. 858; Stone v. Myers, 9 Minn. 303, 86 Am. Dec. 104; Zimmerman v. Lamb, 7 Minn. 421.

Miss.—Armfield v. Armfield, 1 Freem. Ch. 311.

Mo.—Headley Grocer Co. v. Walker, 69 Mo. App. 553.

N. H.—Russell v. Dyer, 33 N. H. 186.

N. J.—Iauch v. De Socarras, 56 N. J. Eq. 538, 39 Atl. 370.

N. C.—Hoke v. Henderson, 14 N. C. 12.

Or.—Seed v. Jennings (1905), 83 Pac. 872.

Pa.—Ketner v. Donten, 15 Pa. Super. Ct. 604, a conveyance fraudulent as to one creditor is fraudulent as to all creditors existing at the time of the conveyance; Miner v. Warner, 2 Grant Cas. 448.

S. D.—Meyer Boot, etc., Co. v. Shenkberg Co., 11 S. D. 620, 80 N. W. 126.

Tenn.—Lippman v. Boals, 16 Lea, 283.

Tex.—DeGarcia v. Galvan, 55 Tex. 53; Riske v. Rotan Grocery Co. (Civ. App.) 84 S. W. 243; Monday v. Vance (Civ. App.), 51 S. W. 346.

Vt.—Farmers' Nat Bank v. Thompson, 74 Vt. 442, 52 Atl. 961; Fair

Haven Marble, etc., Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749.

Wash.—Goodfellow v. Le May, 15 Wash. 684, 47 Pac. 25.

10. *N. Y.*—Baker v. Gilman, 52 Barb. 26, an attorney who was retained to defend a case and rendered some slight service therein a few days before his client made a voluntary conveyance of his property, and who, knowing of such assignment, continued to render his service in said case, and afterwards obtained a single judgment for the value of all his services, was a subsequent creditor with reference to said conveyance.

U. S.—Schreyer v. Platt, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955; Horbeck v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; Thomson v. Crane, 73 Fed. 327.

Ark.—James v. Mallory (1905), 89 S. W. 472.

Cal.—Calkins v. Howard (App. 1905), 83 Pac. 280, a mortgagee is a creditor of the mortgagor.

D. C.—Smith v. Sook, 10 App. Cas. 487.

Iowa.—O'Brien v. Stambach, 101 Iowa, 40, 69 N. W. 1133, 53 Am. St. Rep. 368, judgments are *prima facie* evidence of the existence of indebtedness.

Neb.—Omaha Brewing Assoc. v. Zeller, 4 Neb. (Unoff.) 198, 93 N. W. 762, the indebtedness will relate back to its original inception as regards the question of constituting the claimant an existing creditor.

tracted after the execution of conveyances constituting a secret trust for the benefit of the grantor, but during the continuance thereof, are existing creditors.¹¹ A party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor, and the person to whom he is bound is a creditor, within the meaning of the statutes as to fraudulent conveyances, and a contingent liability or an obligation or indebtedness which has not ripened into an absolute liability at the time of a fraudulent or voluntary conveyance, is protected by the statutes, as well as debts absolutely fixed at the time of the conveyance. A creditor whose claim or demand arises out of or is founded upon a pre-existing contract, although it may be contingent, and whose rights are affected by a fraudulent or voluntary conveyance, can avoid such convey-

N. J.—*Perrine v. Perrine* (Ch. 1901), 50 Atl. 694, it is sufficient to show that the judgment debt or the debt upon which the judgment was based was in existence at the time of the conveyance; *Mason v. Somers*, 59 N. J. Eq. 451, 45 Atl. 602, but an indorser who lends his name to give credit to a note does not thereby become, like the payee, a creditor of the maker, so as to raise a presumption that the maker's subsequent voluntary conveyance of his property is, as to such indorser, fraudulent; *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641, an accommodation endorser of a promissory note which is not dishonored is not a present debtor.

Tenn.—*Wilson v. Vanden*, 99 Tenn. 224, 42 S. W. 5, but a person will be held to be a subsequent creditor, although the grantor owed him a large amount at the time of the execution of the conveyance, where such debt was afterwards fully paid, notwith-

standing the subsequent contraction of other debts of the grantor.

Eng.—*Bennett v. Musgrove*, 2 Ves. 51, 28 Eng. Reprint, 34; *Rider v. Kidder*, 10 Ves. Jr. 360, 32 Eng. Reprint, 884, a wife is a creditor under 13 Eliz., chap. 5, in a case where her husband covenanted with the trustees to pay her a sum of money after his death; *Adames v. Hallett*, L. R. 6 Eq. 468, 18 L. T. Rep. N. S. 789, a creditor under a voluntary *post-obit* bond is entitled to the benefits of 13 Eliz., chap. 5.

The difference between existing and subsequent debts, in reference to voluntary conveyances, is this—as to the former the fraud is an inference of law, but as to the latter there must be fraud in fact. *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381. But see *Gordon v. Reynolds*, 114 Ill. 123.

11. *Bowlus v. Shanabarger*, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167. See *A. Landreth & Co. v. Schevel*, 102 Tenn. 486.

ance when the contingency happens upon which the claim or demand depends, and such liability becomes absolute and fixed.¹²

12. N. Y.—Young v. Heermans, 66 Ky.—Poynter v. Mallory, 20 Ky. L. Rep. 284, 45 S. W. 1042; Johnson v. Harrison, 6 Ky. L. Rep. 591. But see Doty v. Louisville Banking Co., 10 Ky. L. Rep. 898, 11 S. W. 78.

Me.—Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240; Sargent v. Salmond, 27 Me. 539; Thompson v. Thompson, 19 Me. 244, 36 Am. Dec. 751; Howe v. Ward, 4 Me. 195.

Mich.—Pashby v. Mandigo, 42 Mich. 172, 3 N. W. 927.

Minn.—Stone v. Myers, 9 Minn. 303, 84 Am. Dec. 104.

Miss.—Loughridge v. Bowland, 52 Miss. 546; Pennington v. Seal, 49 Miss. 518, warrantee in deed.

N. H.—Parsons v. McKnight, 8 N. H. 35.

N. J.—Long Branch Banking Co. v. Dennis, 56 N. J. Eq. 549, 29 Atl. 689; Soden v. Soden, 34 N. J. Eq. 115; Post v. Stiger, 29 N. J. Eq. 554, a claim arising from a tort; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594, endorser on a note of lessee for rent in advance; Cook v. Johnson, 12 N. J. Eq. 51, 72 Am. Dec. 381.

N. C.—Tatum v. Tatum, 36 N. C. 113.

Pa.—Heath v. Page, 63 Pa. St. 108, 3 Am. Rep. 533, claim for usury penalties; Shonts v. Brown, 27 Pa. St. 123; a claim arising from a tort; Hamet v. Dundass, 4 Pa. St. 178.

Tenn.—Ridout v. Williams, 75 Tenn. 59; Greene v. Starnes, 1 Heisk. 582; Shapiro v. Paletz (Ch. App.), 59 S. W. 774.

Va.—Curd v. Miller, 7 Gratt. 185.

W. Va.—Hawker v. Moore, 40 W. Va. 49, 20 S. E. 848.

U. S.—McLaughlin v. Potomac Bank, 7 How. 220, 12 L. Ed. 675; Thomson v. Crane, 73 Fed. 327; Yardley v. Torr, 67 Fed. 857.

Ala.—Washington v. Norwood, 128 Ala. 338, 30 So. 405; Yeend v. Weeks, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; Bragg v. Patterson, 85 Ala. 233, 4 So. 716; Keel v. Larkin, 72 Ala. 493; Fearn v. Ward, 65 Ala. 33; Anderson v. Anderson, 64 Ala. 403; Bibb v. Freeman, 59 Ala. 612; Gannard v. Eslava, 20 Ala. 732, the warrantee in a deed is a creditor of the warrantor; Foote v. Cobb, 18 Ala. 585.

Ark.—Williams v. Bizzell, 11 Ark. 716.

Fla.—Reel v. Livingston, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202.

Ga.—Banks v. McCandless, 119 Ga. 793, 47 S. E. 332.

Ill.—Hatfield v. Merod, 82 Ill. 113; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Sanderson v. Snow, 68 Ill. App. 384; Dunphy v. Gorman, 29 Ill. App. 132.

Ind.—Bowen v. State, 121 Ind. 235, 23 N. E. 75; Wright v. Nipple, 92 Ind. 310.

The right of a pre-existing creditor to impeach a conveyance is not affected by a renewal of the debt or change of form of the evidence of debt, although such renewal or change of form was made subsequent to the conveyance.¹³ In cases of running account, the earlier indebtedness being paid by the proceeds of the later, the continuing indebtedness stands upon the same footing as an indebtedness existing at the time of the conveyance attacked as fraudulent as to creditors.¹⁴ Prior lien creditors or

Wis.—Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232.

Wyo.—Culver v. Graham, 3 Wyo. 211, 21 Pac. 694, purchaser, after voluntary conveyance, of debtor's outstanding notes. But see Fales v. Thompson, 1 Mass. 134; Henderson v. Dodd, Bailey Eq. (S. C.) 138.

13. *N. Y.*—Loeschigk v. Addison, 19 Abb. Pr. 169.

Ala.—Moore v. Spence, 6 Ala. 506.

Ind.—Stout v. Stout, 77 Ind. 537.

Kan.—Kellogg v. Douglass County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

Ky.—Lowry v. Fisher, 2 Bush. 70, 92 Am. Dec. 475; Buffington v. Mosby, 17 Ky. L. Rep. 1307, 34 S. W. 704.

Md.—Spuck v. Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427, property conveyed to prevent satisfaction of any judgment that might be recovered against the grantor in an action by a servant for injuries.

Mich.—Preston Nat. Bank v. Pierson, 112 Mich. 435, 70 N. W. 1013.

Miss.—Thompson v. Hester, 55 Miss. 656.

Neb.—Omaha Brewing Assoc. v. Zeller, 4 Nebr. (Unoff.) 198, 93 N. W. 762.

N. H.—Parsons v. McKnight, 8 N. H. 35.

N. J.—First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092.

N. M.—First Nat. Bank v. McClelland, 9 N. M. 636, 58 Pac. 347.

Vt.—Farmers' Nat. Bank v. Thomson, 74 Vt. 442, 52 Atl. 961; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

Wis.—Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232.

Can.—Ferguson v. Kenny, 16 Ont. App. 276.

Eng.—Whittington v. Jennings, 3 L. J. Ch. 157, 6 Sim. 493, 9 Eng. Ch. 493.

Contra.—Bank v. Marchand, T. U. P. Charlt. (Ga.) 247; Boone County Nat. Bank v. Newkirk, 144 Mo. 472, 46 S. W. 606.

14. *Ill.*—Thomas v. Lye, 37 Ill. App. 482.

Ky.—Little v. Ragan, 7 Ky. L. Rep. 391, when the creditor has an account due from his debtor at the date of the latter's voluntary or fraudulent deed, although the amount was afterwards increased by subsequent purchases, the whole is to be taken as a liability existing at the date of the deed.

Md.—Diggs v. McCollough, 69 Md. 592, 16 Atl. 453, but one who is a creditor at the time of a fraudulent conveyance, but who receives payment and continues to supply goods to the debtor, taking notes on short time therefor, is a subsequent creditor.

creditors whose liens attached before an alleged fraudulent conveyance cannot complain of a subsequent fraudulent conveyance or encumbrance of the property and are not entitled to equitable interference, since their liens are in no way affected by the fraudulent conveyance and it cannot affect their rights, and a sale under their judgments will entirely divest the title of the grantee or subsequent encumbrancer.¹⁵ A general creditor or creditor-at-large, or a creditor by simple contract whose debt has

Miss.—Chapman v. Hughes, 61 Miss. 339, a judgment creditor whose debt, for which the judgment was rendered, was partly contracted before and partly after a voluntary conveyance of lands sought to be subjected by him to the payment of such debt, will not be treated as a subsequent creditor as to the entire indebtedness.

N. C.—Johnson v. Murchison, 60 N. C. 286, 1 Winst. 292.

Tenn.—Trezevant v. Terrill, 96 Tenn. 528, 33 S. W. 109.

Where a creditor blends demands, which accrued prior to a conveyance by the debtor which he would impeach on the grounds of fraud, in the same suit with demands or interest accruing after said conveyance, and having recovered judgment, extends his execution on the land, he can come in only in the character of a subsequent creditor. Quimby v. Dill, 40 Me. 528; Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597; Husher v. Hazelton, 5 Me. 471, 17 Am. Dec. 253; Reed v. Woodman, 4 Me. 400.

15. La.—Payne v. Kemp, 33 La. Ann. 818; Levi v. Morgan, 33 La. Ann. 532.

Me.—Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687.

Md.—Baltimore High Grade Brick Co. v. Amis, 95 Md. 571, 52 Atl. 582, 53 Atl. 148.

Mass.—Powers v. Russell, 13 Pick. 69.

Mo.—Brinkerhoff-Faris Trust, etc., Co. v. Horn, 83 Mo. App. 114.

N. H.—Blake v. Williams, 36 N. H. 39.

N. J.—Meeker v. Warren, 66 N. J. Eq. 146, 57 Atl. 421, a judgment creditor cannot maintain a bill to set aside as fraudulent a quitclaim deed not conveying the fee.

Ohio.—Stephenson v. Donahue, 40 Ohio St. 184, *aff'd* 6 Ohio Dec. 828, 8 Am. L. Rec. 358.

Okla.—First Nat. Bank v. Yeoman, 14 Okla. 626, 78 Pac. 388.

Pa.—Armington v. Rau, 100 Pa. St. 105; Haak's Appeal, 100 Pa. St. 59; Appeal of Byrod, 31 Pa. St. 241; Barrell v. Adams, 26 Pa. Super. Ct. 635; Boyle v. Thomas, 1 Chest. Co. Rep. 117.

Tex.—Pearson v. Hudson, 52 Tex. 352.

W. Va.—Carr v. Summerfield, 47 W. Va. 155, 34 S. E. 804.

Can.—Crombie v. Young, 26 Ont. 194.

But see Shiveley v. Jones, 45 Ky. 274, a first mortgagee may take advantage of a fraud against creditors in a subsequent mortgage on the same land, so far as it may impede him, since a conveyance fraudulent as to some creditors is fraudulent as to all.

not been legally ascertained by judgment, as a general rule, is not in a position to assert his rights by action as a creditor and cannot attack a conveyance or other transfer of property by his debtor as fraudulent as against creditors, but he must first establish his debt by the judgment of a court of competent jurisdiction, and either acquire a lien by valid legal process upon the specific property, or to be in a situation to perfect a lien thereon, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent conveyance or other transfer.¹⁶ This rule is, how-

16. *N. Y.*—*Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13, an execution issued after the death of the judgment debtor is wholly void and insufficient to sustain a creditor's bill; *Southard v. Benner*, 72 N. Y. 424, a creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien, or a right to lien upon the specific property, he is not in a condition to assert his rights by action as a creditor; *Estes v. Wilcox*, 67 N. Y. 264; *Geery v. Geery*, 63 N. Y. 256; *Rinchev v. Stryker*, 28 N. Y. 45, 84 Am. Dec. 324, but a party procuring an attachment is not to be deemed a mere creditor at large of the defendant therein, after the writ is served, but a creditor having a specific lien upon the goods attached; *Cramer v. Blood*, 57 Barb. 155, 671; *Davis v. Graves*, 29 Barb. 480; *Wintringham v. Wintringham*, 20 Johns. 296; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671, 6 Johns. Ch. 139; *Frisbey v. Thayer*, 25 Wend. 396.

U. S.—*Jones v. Green*, 1 Wall. 330, 17 L. Ed. 553; *Day v. Washburn*, 24 How. 352, 16 L. Ed. 712; *Viquesney v. Allen*, 131 Fed. 21, 65 C. C. A. 259; *United States v. Ingate*, 48 Fed. 251.

Ark.—*Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274.

Cal.—*Algeltinger v. Einstein*, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131.

Colo.—*Hugus v. Hardenburg*, 19 Colo. App. 464, 76 Pac. 543.

Ill.—*Rogers v. Dimon*, 106 Ill. App. 201; *Koster v. Hiller*, 4 Ill. App. 21.

Ind.—*State Bank v. Backus* (App.), 66 N. E. 475, *aff'd* 160 Ind. 682, 67 N. E. 512.

Iowa.—*Klay v. McKellar*, 122 Iowa, 163, 97 N. W. 1091. But see *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Kan.—*Chicago Bldg., etc., Co. v. I. A. Taylor Banking Co.*, 78 Pac. 808; *Daugherty v. Powell*, 67 Kan. 857, 72 Pac. 274, 74 Pac. 242.

Ky.—*McKinley v. Combs*, 1 T. B. Mon. 105.

Md.—*Wanamaker v. Bowes*, 36 Md. 42; *Griffith v. Frederick County Bank*, 6 Gill & J. 424.

Mich.—*Eslow v. Mitchell*, 26 Mich. 500; *Fox v. Clark*, 1 Walk. Ch. 535. See *Hatch v. Daugherty*, 145 Mich. 569, 13 Det. L. N. 657, 108 N. W. 986.

Mo.—*Davidson v. Dockery*, 179 Mo. 687, 78 S. W. 624, the creditor must either have reduced his claim to judg-

ever, subject to certain exceptions which will be hereafter discussed.¹⁷

§ 3. **Subsequent creditors.**—It is the general rule that a voluntary conveyance by a debtor cannot be set aside at the instance of subsequent creditors, and the property of the debtor, alleged to have been transferred in fraud of his creditors, subjected to their debts against him, unless it is shown that the transfer was made with the intent to defraud subsequent creditors.¹⁸ But subsequent as well as existing creditors, may attack

ment, have a legal, equitable, or attachment lien on the land, or show that, although but a general creditor, he has no adequate remedy at law; *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609; *Peters Shoe Co. v. Arnold*, 82 Mo. App. 1.

N. J.—*Guy B. Waite Co. v. Otto (Ch.)*, 54 Atl. 425, a creditor of a living debtor must have a lien which is not created by a foreign judgment; *Hunt v. Field*, 9 N. J. Eq. 36, 57 Am. Dec. 365.

N. C.—*Cowan v. Phillips*, 122 N. C. 70, 28 S. E. 961.

Tenn.—*Hopkins v. Webb*, 9 Humphr. 519, claim must be established by a judgment at law or a decree in equity.

Tex.—*Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672, 57 S. W. 980.

Va.—*Tate v. Liggat*, 2 Leigh, 84.

Wash.—*Rothchild v. Trewella*, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281.

W. Va.—*Kennewig Co. v. Moore*, 49 W. Va. 323, 38 S. E. 558.

Wis.—*Miller v. Drane*, 122 Wis. 315, 99 N. W. 1017.

Eng.—*Collins v. Burton*, 4 DeG. & J. 612, 61 Eng. 485, 45 Eng. Reprint,

238; *Smith v. Hurst*, 10 Hare, 30, 17 Jur. 30, 22 L. J. Ch. 289, 15 Eng. L. & Eq. 520, 44 Eng. Ch. 30; *Angell v. Draper*, 1 Vern. Ch. 399, 23 Eng. Reprint, 543; *Colman v. Croker*, 1 Ves. Jr. 160, 30 Eng. Reprint, 280.

17. See Conditions precedent to suit in equity to set aside conveyance, chap. XV, § 31, *infra*.

18. *N. Y.*—*Phoenix Bank v. Stafford*, 89 N. Y. 405; *Phillips v. Wooster*, 36 N. Y. 412; *Wadsworth v. Havens*, 3 Wend. 411.

U. S.—*Graham v. La Crosse, etc., Co.*, 102 U. S. 148, 26 L. Ed. 106; *Mattingly v. Nye*, 8 Wall. 370, 17 L. Ed. 380; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 110 Fed. 491; *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. 642; *Metropolitan Nat. Bank v. Rogers*, 47 Fed. 148; *Burdick v. Gill*, 7 Fed. 668, 2 McCrary, 486.

Ala.—*Wilson v. Stevens*, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86; *Flyton Land Co. v. Iron City Steam Bottling Works*, 109 Ala. 602, 20 So. 51; *O'Neil v. Birmingham Brewing Co.*, 101 Ala. 383, 13 So. 576; *Lockard v. Nash*, 64 Ala. 385; *Cole v. Varner*, 31 Ala. 244.

Ark.—*Crampton v. Schaap*, 56 Ark.

their debtor's conveyance as fraudulent if made with intent to

253, 19 S. W. 669; *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707.

Colo.—*Arnett v. Coffey*, 1 Colo. App. 34, 27 Pac. 614.

Conn.—*Whiting v. Ralph*, 75 Conn. 41, 52 Atl. 406; *Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23 Atl. 154; *Smith v. Gaylord*, 47 Conn. 380.

Ga.—*Clayton v. Brown*, 30 Ga. 490.

Ill.—*Chicago Daily News Co. v. Siegel*, 212 Ill. 617, 72 N. E. 810; *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 571; *Faloon v. McIntyre*, 118 Ill. 292, 8 N. E. 315, *aff'g* 17 Ill. App. 479; *Durand v. Weightman*, 108 Ill. 489; *Tunison v. Chamblin*, 88 Ill. 378; *Lincoln v. McLaughlin*, 74 Ill. 11; *Bridgford v. Riddell*, 55 Ill. 261; *Mixell v. Lutz*, 34 Ill. 382; *Carter v. Lewis*, 29 Ill. 500; *Hunt v. Connor*, 74 Ill. App. 298; *Racine Wagon, etc., Co. v. Roberts*, 54 Ill. App. 515; *Sweet v. Dean*, 43 Ill. App. 650; *Edgerly v. First Nat. Bank*, 30 Ill. App. 425.

Ind.—*Bishop v. Redmond*, 83 Ind. 157.

Iowa.—*Keehn v. Keehn*, 115 Iowa, 467, 88 N. W. 957; *Heaton v. Ainley*, 108 Iowa, 112, 78 N. W. 798; *Everist v. Pierce*, 107 Iowa, 44, 77 N. W. 508.

Kan.—*Chase State Bank v. Chat-ten*, 69 Kan. 435, 77 Pac. 96; *Voorhis v. Michaelis*, 45 Kan. 255, 25 Pac. 592.

Ky.—*Gregory v. Lamb*, 101 Ky. 727, 42 S. W. 339, 19 Ky. L. Rep. 943; *Collings v. Collings*, 29 Ky. L. Rep. 51; *Hunt v. Nance*, 28 Ky. L. Rep. 1188, 92 S. W. 6; *Mundy v. Mas-son*, 67 Ky. 339; *Haskell v. Bakewell*, 49 Ky. 206; *Lillard v. McGee*, 4 Bibb,

165; *Howell v. Smith*, 1 Ky. L. Rep. 415. See also *Boldrick v. Mills*, 29 Ky. L. Rep. 852, 96 S. W. 524.

La.—*Mossop v. His Creditors*, 41 La. Ann. 296, 6 So. 134; *Davis v. Stern*, 15 La. Ann. 177; *Simpson v. Mills*, 12 La. Ann. 173; *Brunet v. Du-vergis*, 5 La. 124; *Brown v. Ferguson*, 4 La. 257; *Morgan v. Davis*, 4 La. 141; *Mercer v. Andrews*, 2 La. 538; *Henry v. Hyde*, 5 Mart. N. S. 633; *Hesser v. Black*, 5 Mart. N. S. 96.

Me.—*Fletcher v. Clarke*, 29 Me. 486; *Whitmore v. Woodward*, 28 Me. 392.

Md.—*Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453; *Matthai v. Heather*, 57 Md. 483; *Ward v. Hollins*, 14 Md. 158; *Williams v. Banks*, 11 Md. 198; *Faringer v. Ramsay*, 4 Md. Ch. 33.

Mass.—*Plimpton v. Goodell*, 143 Mass. 365, 9 N. E. 791; *Day v. Cooley*, 118 Mass. 524.

Mich.—*Barkworth v. Palmer*, 118 Mich. 50, 76 N. W. 151; *Cole v. Brown*, 114 Mich. 396, 72 N. W. 247, 68 Am. St. Rep. 491; *Hopson v. Payne*, 7 Mich. 334.

Miss.—*Pennington v. Seal*, 49 Miss. 518; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Henry v. Fullerton*, 13 Sm. & M. 631.

Mo.—*Welch v. Mann*, 193 Mo. 304, 92 S. W. 98; *Krueger v. Vorhauer*, 164 Mo. 156, 63 S. W. 1098; *Caldwell v. Smith*, 88 Mo. 44; *Scudder v. Morris*, 107 Mo. App. 634, 82 S. W. 217.

Neb.—*Weckerly v. Taylor* (1905), 103 N. W. 1065; *Pender State Bank v. Frey*, 3 Neb. (Unoff.) 83, 91 N. W. 239.

N. J.—*Kinsey v. Feller*, 64 N. J. Eq. 367, 51 Atl. 485, *rev'g* 50 Atl.

defraud them.¹⁹ A conveyance may also be set aside as fraudulent as to subsequent creditors where the conveyance was made secretly while the grantor remained in possession and in seem-

680; *Carter v. Carter*, 63 N. J. Eq. 726, 53 Atl. 160, *aff'g* 65 N. J. Eq. 766, 55 Atl. 1132; *Burne v. Kunzman* (Ch. 1890), 19 Atl. 667; *Campbell v. Tompkins*, 32 N. J. Eq. 170; *Allaire v. Day*, 30 N. J. Eq. 231; *Carpenter v. Carpenter*, 27 N. J. Eq. 502; *Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 13; *Beeckman v. Montgomery*, 14 N. J. Eq. 106, 80 Am. Dec. 229.

N. C.—*Smith v. Reavis*, 29 N. C. 341.

Ohio.—*Evans v. Lewis*, 30 Ohio St. 11; *Robinson v. Von Dolcke*, 3 Ohio S. & C. Pl. Dec. 107, 1 Ohio N. P. 429.

Or.—*Seed v. Jennings* (1905), 83 Pac. 872.

Pa. — *Westmoreland Guarantee Bldg., etc., Assoc. v. Thomas*, 207 Pa. St. 513, 56 Atl. 1072; *Kuder v. Chadwick*, 207 Pa. St. 182, 56 Atl. 407; *Best v. Smith*, 193 Pa. St. 89, 44 Atl. 329, 74 Am. St. Rep. 676; *Reese v. Reese*, 157 Pa. St. 200, 27 Atl. 703; *Harlan v. Maglaughlin*, 90 Pa. St. 293; *Monroe v. Smith*, 79 Pa. St. 459; *Larkin v. McMullin*, 49 Pa. St. 29; *Murphy v. Solms*, 6 Pa. Co. Ct. 264; *Brown v. Atkinson*, 9 Kulp, 164; *Clark v. Krieg*, 7 Phila. 126.

S. C.—*King v. Clarke*, 2 Hill Eq. 611; *Henderson v. Dodd*, Bailey Eq. 138.

Tenn.—*Churchill v. Wells*, 47 Tenn. 364; *Hickman v. Perrin*, 46 Tenn. 135; *Nicholas v. Ward*, 38 Tenn. 323, 73 Am. Dec. 177; *Dillard v. Dillard*, 22 Tenn. 41.

Tex.—*Martin Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975; *Heath v.*

First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123.

Vt.—*McLane v. Johnson*, 43 Vt. 48; *Church v. Chapin*, 35 Vt. 223.

Va.—*Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Pratt v. Cox*, 22 Gratt. 330; *Johnston v. Zane*, 11 Gratt. 552.

W. Va.—*Farmers' Bank v. Gould*, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847; *Silverman v. Greaser*, 27 W. Va. 550.

Can.—*Ferguson v. Ferguson*, 9 Ont. 218; *Darling v. Price*, 27 Grant Ch. (U. C.) 331.

Eng.—*In re Lane-Fox* (1900), 2 Q. B. 508, 69 L. J. Q. B. 508, 83 L. T. Rep. N. S. 176, 7 Manson, 295, 48 Wkly. Rep. 650; *Stileman v. Ashdown*, Ambl. 13, 27 Eng. Reprint, 7, 2 Atk. 477, 26 Eng. Reprint, 688; *Gugen v. Sampson*, 4 F. & F. 974; *Holmes v. Penny*, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; *Kidney v. Coussmaker*, 12 Ves. Jr. 136, 2 Rev. Rep. 118, 33 Eng. Reprint, 53. See also Effect of want of consideration as to subsequent creditors, chap. VIII, § 36, *infra*.

19. *N. Y.*—*Ebbitt v. Dunham*, 25 Misc. Rep. 232, 55 N. Y. Supp. 78.

Colo.—*Emery v. Yount*, 7 Colo. 107, 1 Pac. 686.

Ind.—*Barrow v. Barrow*, 108 Ind. 345, 9 N. E. 371; *Bishop v. Redmond*, 83 Ind. 157.

Ky.—*Johnson v. Skaggs*, 2 S. W. 493.

Md.—*Spuck v. Logan*, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

ing ownership of the property and kept up his credit thereby, and knowledge of the transfer was withheld from such creditors, who dealt with the grantor and extended him credit upon the faith of his owning the property transferred;²⁰ or the grantor has obtained credit thereby, while embarking in some new and hazardous business requiring such credit and incurred debts which possible losses might render him unable to pay, or the debts which he has incurred were incurred soon after the conveyance, thus making the intent to defraud creditors whose rights may and do shortly supervene a natural and almost necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive, or the grantor in anticipation of entering on a new business conveys property to prevent its application to the grantor's possible debts in case of financial misfortune, whereby the hazard or risk of the business should be cast upon the parties who become his creditors in the new business.²¹ But fraud in fact must be proved in order to set aside

Mass.—Day v. Cooley, 118 Mass. 524.

N. J.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13.

Tenn.—Churchill v. Wells, 47 Tenn. 364.

Tex.—Tucker v. Pennington (Civ. App.), 45 S. W. 313.

W. Va.—Silverman v. Greaser, 27 W. Va. 550.

Wis.—Zimmerman v. Bannon, 101 Wis. 407, 77 N. W. 735; Hoffman v. Junk, 51 Wis. 613, 8 N. W. 493.

20. *N. Y.*—Shand v. Hanley, 71 N. Y. 319; Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733.

Iowa.—First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107; Hitt v. Sterling-Goold Mfg. Co., 111 Iowa, 458, 82 N. W. 919; Hook v. Mowre, 17 Iowa, 195.

Miss.—Robertson & Co. v. Colum-

bus Ins., etc., Co., 85 Miss. 234, 38 So. 100; Winn v. Barnett, 31 Miss. 653.

Ohio.—Bowlus v. Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

S. C.—Kidd v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

21. *N. Y.*—Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360; Young v. Heermans, 66 N. Y. 374; Case v. Phelps, 39 N. Y. 164; Dygert v. Remerschnider, 32 N. Y. 629; Carpenter v. Roe, 10 N. Y. 227; O'Brien v. Whigam, 9 App. Div. 113, 41 N. Y. Supp. 40.

U. S.—Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955; Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; Graham v. LaCross, etc., R. Co., 102 U. S. 148, 26 L. Ed. 106; Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481; Mattingly

a voluntary conveyance at the instance of subsequent creditors, and it will not be imputed when the facts upon which it is predicated may consist with honesty and purity of intention; and a mere expectation of future indebtedness, or even an intent to contract debts if it is not coupled with a purpose to convey the property in order to withdraw it from the reach of subsequent creditors, and there is no immediate intention of engaging in a new or a hazardous business or incurring indebtedness with a preconceived purpose not to pay it, will not make the conveyance invalid, as against subsequent creditors, whom subsequent unexpected depreciation in the value of the debtor's property or unexpected reverses or embarrassments in business render the debtor unable to pay.²²

v. Nye, 8 Wall. 370, 19 L. Ed. 380; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Burdick v. Gill*, 7 Fed. 668, 2 McCary 486; *Ridgeway v. Underwood*, 20 Fed. Cas. No. 11,815, 4 Wash. 129; *Parish v. Murphee*, 13 How. 99.

Ala.—*Echols v. Orr*, 106 Ala. 237, 17 So. 677; *Seals v. Robinson*, 75 Ala. 363; *Kirksey v. Snedecor*, 60 Ala. 192.

Md.—*Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453; *Matthai v. Heather*, 57 Md. 483.

Mich.—*Herschfeldt v. George*, 6 Mich. 456.

Neb.—*Ayers v. Wolcott*, 66 Neb. 712, 92 N. W. 1036.

N. J.—*Hildebrand v. Willig*, 64 N. J. Ed. 249, 53 Atl. 1035; *Minzesheimer v. Doolittle*, 56 N. J. Eq. 206, 39 Atl. 386; *Providence City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158.

Ohio.—*Hedrick v. Gregg*, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24.

Pa.—*Mullen v. Wilson*, 44 Pa. St. 413, 84 Am. Dec. 461; *Black v. Nease*, 37 Pa. St. 433; *Sanders v. Wagon-*

seller, 19 Pa. St. 248; *Thomson v. Dougherty*, 12 Serg. & K. 448; *Ma-teer v. Hissim*, 3 Penr. & W. 160.

Tex.—*Lewis v. Simon*, 72 Tex. 470, 10 S. W. 554; *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

Can.—*Bucklin v. Rose*, 7 Grant Ch. (U. C.) 440; *Bank of British North America v. Rattenbury*, 7 Grant Ch. (U. C.) 383.

Eng.—*Ex parte Russell*, 19 Ch. D. 588, 51 L. G. Ch. 521, 46 L. T. Rep. N. S. 113, 30 Wkly. Rep. 584; *Mackay v. Douglass*, L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. Rep. N. S. 721; 20 Wkly. Rep. 652; *Taylor v. Jones*, 2 Atk. 601; *Stileman v. Ash-down*, Ambl. 13, 27 Eng. Reprint, 7, 2 Atk. 477, 26 Eng. Reprint, 688; 2 Story Eq. Jur., § 356 and note; *Barling v. Bishopp*, 29 Beav. 417, 6 Jur. N. S. 812, 8 Wkly. Rep. 631, 54 Eng. Reprint, 689; *Richardson v. Smell-wood*, Jac. 552, 4 Eng. Ch. 552, 27 Eng. Reprint, 958.

22. *N. Y.*—*Neuberger v. Keim*, 134 N. Y. 35, 31 N. E. 268.

U. S.—*Schreyer v. Scott*, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955;

§ 4. Effect of fraud as to pre-existing creditors.—The authorities are conflicting upon the question as to whether subsequent creditors can attack and set aside a prior conveyance of his property by a debtor on the ground that it was fraudulent as to existing creditors. The rule is maintained in many jurisdictions that a conveyance fraudulent as to existing creditors is fraudulent as to subsequent creditors as well and subsequent creditors can attack and set it aside upon showing actual fraud as to existing creditors, upon the theory that proof of such fraud is sufficient evidence of fraud upon subsequent creditors.²³ In

Adams v. Riley, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; *Wallace v. Penfield*, 106 U. S. 260, 1 Sup. Ct. 216, 27 L. Ed. 147.

Iowa.—*Lyman v. Cessford*, 15 Iowa, 229.

Md.—*Totten v. Brady*, 54 Md. 170.

Mo.—*Payne v. Stanton*, 59 Mo. 158; *Pepper v. Carter*, 11 Mo. 540.

Neb.—*Weckerly v. Taylor* (1905), 103 N. W. 1065.

N. J.—*Gray v. Folwell*, 57 N. J. Eq. 446, 41 Atl. 869.

Or.—*Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676.

Pa.—*Harlan v. Maglauglin*, 90 Pa. St. 293; *Williams v. Davis*, 69 Pa. St. 21; *Snyder v. Christ*, 39 Pa. St. 499.

Tex.—*Gonzales v. Adoue*, 94 Tex. 120, 58 S. W. 951.

Va.—*Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225.

Can.—*Fleming v. Edwards*, 23 Ont. App. 718; *Mulholland v. Williamson*, 14 Grant Ch. (U. C.) 291.

23. *N. Y.*—*Carr v. Breese*, 81 N. Y. 584; *Mead v. Gregg*, 12 Barb. 653, antecedent debts must be shown sufficient in amount to afford reasonable evidence of fraudulent intent; *Weld v. Reilly*, 48 N. Y. Super Ct. 531; *Foeschigk v. Addison*, 19 Abb. Pr.

169; *Spicer v. Ayers*, 53 How. Pr. 405; *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235; *King v. Wilcox*, 11 Paige, 589; *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520. But see *Holmes v. Clark*, a voluntary conveyance is not fraudulent as to subsequent creditors, unless the grantor was then insolvent, or the deed was made with intent to defraud subsequent creditors.

U. S.—*Lilienthal v. Drucklieb*, 92 Fed. 753, 34 C. C. A. 657; *Voorhees v. Blanton*, 83 Fed. 234.

Ala.—*Prestwood v. Troy Fertilizer Co.*, 115 Ala. 668, 22 So. 77; *Heinz v. White*, 105 Ala. 670, 17 So. 185; *Yeend v. Weeks*, 104 Ala. 331, 16 So. 165, 53 Am. St. Rep. 50; *Dickson v. McLarney*, 97 Ala. 383, 12 So. 398; *Pinkston v. McLemore*, 31 Ala. 308; *Johnson v. Thweatt*, 18 Ala. 741.

Ark.—*Semmes v. Underwood*, 64 Ark. 415, 42 S. W. 1069; *May v. State Nat. Bank*, 59 Ark. 614, 28 S. W. 431; *Toney v. McGehee*, 38 Ark. 419.

Colo.—*Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532; *Wilcoxon v. Morgan*, 2 Colo. 473.

Conn.—*Barbour v. Connecticut Mut. L. Ins. Co.*, 61 Conn. 240, 23

many other jurisdictions the contrary rule is held that a conveyance which is fraudulent and void as to existing creditors is not necessarily fraudulent and void as to subsequent creditors, but that it is only bad as to those it was intended to defraud, and that subsequent creditors can only avail themselves of the fraud which is practiced on them and can only attack such conveyance on the ground of actual fraud as against them.²⁴ Subse-

Atl. 154; *Bassett v. McKenna*, 52 Conn. 437.

D. C.—*Edwards v. Entwisle*, 2 Mackey, 43; *Killian v. Clark*, 3 MacArthur, 379.

Ky.—*Dishman v. Davidson*, 19 Ky. L. Rep. 139, 39 S. W. 515.

Me.—*Whitmore v. Woodward*, 28 Me. 392; *Clark v. French*, 23 Me. 221, 39 Am. Dec. 618.

Mass.—*Woodbury v. Sparrell* Print, 187 Mass. 426, 73 N. E. 547; *Livermore v. Boutelle*, 11 Gray, 217, 71 Am. Dec. 708; *Parkman v. Welch*, 36 Mass. 231; *Clapp v. Leatherbee*, 35 Mass. 131; *Damon v. Bryant*, 19 Mass. 411.

Mich.—*Hopson v. Payne*, 7 Mich. 334; *Herschfeldt v. George*, 6 Mich. 456.

N. H.—*Cook v. Lee*, 72 N. H. 569, 58 Atl. 511; *Coolidge v. Melvin*, 42 N. H. 510; *Smyth v. Carlisle*, 16 N. H. 464, 17 N. H. 417.

N. C.—*Toole v. Darden*, 41 N. C. 394.

Ohio.—*Evans v. Lewis*, 30 Ohio St. 11; *Vanzant v. Davies*, 6 Ohio St. 52; *Hedrick v. Gregg*, 10 Ohio S. & C. Pl. Dec. 462, 8 Ohio N. P. 24.

Tenn.—*Nelson v. Venden*, 99 Tenn. 224, 42 S. W. 5; *Trezevant v. Terrell*, 96 Tenn. 528, 33 S. W. 109; *Nichol v. Nichol*, 63 Tenn. 145; *White v. Bettis*, 56 Tenn. 645; *Nicholas v. Ward*, 38 Tenn. 323, 73 Am. Dec. 177; *Hester v. Wilkinson*, 25 Tenn.

215, 44 Am. Dec. 303; *Young v. Pate*, 4 Yerg. 164; *Carpenter v. Scales* (Ch. App. 1897), 48 S. W. 249.

Vt.—*McLane v. Johnson*, 43 Vt. 48; *Dewey v. Long*, 25 Vt. 264.

Va.—*Yates v. Law*, 86 Va. 117, 9 S. E. 508; *Hutchinson v. Kelly*, 1 Rob. 123, 39 Am. Dec. 250.

W. Va.—*Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

Can.—*Struthers v. Glennie*, 14 Ont. 726.

24. *U. S.*—*Wallace v. Penfield*, 106 U. S. 260, 1 Sup. Ct. 216, 27 L. Ed. 147; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603.

Cal.—*Banning v. Marleau*, 133 Cal. 485, 65 Pac. 964; *Hussey v. Castle*, 41 Cal. 239; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Wells v. Stout*, 9 Cal. 479. See also *Youd v. German Savings, etc., Soc.* (Cal. App. 1906), 86 Pac. 991.

Ga.—*Brown v. Spivey*, 53 Ga. 155; *Cunningham v. Schley*, 41 Ga. 426.

Ill.—*Higgins v. White*, 118 Ill. 619, 8 N. E. 808; *Crawford v. Logan*, 97 Ill. 396; *Phillips v. North*, 77 Ill. 243; *Blakely Printing Co. v. Pease*, 95 Ill. App. 341.

Ind.—*Stumph v. Bruner*, 89 Ind. 556; *Lynch v. Raleigh*, 3 Ind. 273; *Doe v. Hurd*, 7 Blackf. 510; *Paine v. Doe*, 7 Blackf. 485. Compare *Dart v. Stewart*, 17 Ind. 221; *Rufing v. Tilton*, 12 Ind. 259.

Iowa.—*Brundage v. Cheneworth*,

quent creditors are in a less favorable position to attack a voluntary conveyance as fraudulent because their debts, being contracted after the conveyance they seek to impeach, cannot be said to have been incurred on the faith of the property conveyed.²⁵ It has been held that a gift by an insolvent debtor is not void as to subsequent creditors in the absence of fraud, although money was obtained of a subsequent creditor for the express purpose of paying debts existing when the gift was made, as to which the gift was fraudulent, and was actually used for that purpose.²⁶ And where a debtor, solvent at the time, and

101 Iowa, 256; 70 N. W. 211, 63 Am. St. Rep. 382; *Carbioner v. Montgomery*, 97 Iowa, 659, 66 N. W. 900; *Rock Island Stove Co. v. Walrod*, 75 Iowa, 479, 39 N. W. 811; *State v. Wallace*, 67 Iowa, 77, 24 N. W. 609; *Lyman v. Cessford*, 15 Iowa, 229.

Minn.—*Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242; *Fulington v. Northwestern Importers', etc., Assoc.*, 48 Minn. 490, 51 N. W. 475, 31 Am. St. Rep. 663; *Bloom v. Moy*, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243; *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815; *Sanders v. Chandler*, 26 Minn. 273, 3 N. W. 351; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104; *Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97.

Miss.—*Simmons v. Ingram*, 60 Miss. 886; *Winn v. Barnett*, 31 Miss. 653; *Henry v. Fullerton*, 13 Sm. & M. 631.

Mo.—*Johnson v. Murphy*, 180 Mo. 597, 79 S. W. 909; *Burgess v. McLean*, 85 Mo. 678; *Pepper v. Carter*, 11 Mo. 540; *Mutual L. Ins. Co. v. Sandfelder*, 9 Mo. 285. But see *Bracken v. Milner*, 99 Mo. App. 187, 73 S. W. 225.

Neb.—*Ayers v. Wolcott*, 66 Neb.

712, 92 N. W. 1036; *Racek v. First Nat. Bank*, 62 Neb. 669, 87 N. W. 542; *Graham v. Townsend*, 62 Neb. 364, 87 N. W. 169.

N. J.—*Gray v. Folwell*, 57 N. J. Eq. 446, 41 Atl. 869; *Zinn v. Brinkerhoff*, 48 N. J. Eq. 513, 22 Atl. 353.

Pa.—*Buckley v. Duff*, 114 Pa. St. 596, 8 Atl. 188; *Kimble v. Smith*, 95 Pa. St. 69; *Harlan v. Maglaughlin*, 90 Pa. St. 293; *Monroe v. Smith*, 79 Pa. St. 459; *Staller v. Kirkpatrick*, 1 Mona. 486. But see *Ammon's Appeal*, 63 Pa. St. 284.

S. C.—*Richardson v. Rhodus*, 14 Rich. 95; *Ingrem v. Phillips*, 3 Strobb. 565; *Iley v. Niswanger*, 1 McCord Eq. 518.

S. D.—*Aldous v. Olverson*, 17 S. D. 190, 95 N. W. 917.

Tex.—*Bavouset v. York*, 18 Tex. Civ. App. 428.

Wash.—*Mayer v. Frasch*, 7 Wash. 504, 35 Pac. 409.

W. Va.—*Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Rose v. Brown*, 11 W. Va. 122; *Lockhard v. Beckley*, 10 W. Va. 87.

25. *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148.

26. *First Nat. Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851.

having no actual intent to defraud creditors, disposes of property for an inadequate consideration or by a voluntary conveyance, subsequent creditors cannot question the transaction.²⁷

§ 5. **Effect of prior and continuing indebtedness.**—Where a conveyance is made with intent to defraud creditors, by one at the time in debt, and who subsequently continues to be indebted, the indebtedness being continuous and unbroken, it is fraudulent and void as to existing creditors.²⁸ Where a conveyance is fraudulent and void as to existing creditors, the subsequent payment and discharge of such existing indebtedness with money or property received by contracting new debts with subsequent creditors, will not render the conveyance valid as to subsequent creditors, but such conveyance is fraudulent and void as to such subsequent creditors also.²⁹

27. *N. Y.*—Phoenix Bank v. Stafford, 89 N. Y. 405.

U. S.—Graham v. Lacrosse & M. R. Co., 102 U. S. 148, 26 L. Ed. 106.

Conn.—Smith v. Gaylord, 47 Conn. 380.

Ill.—Durand v. Weightman, 108 Ill. 489; Jackson v. Miner, 101 Ill. 550; Lincoln v. McLaughlin, 74 Ill. 11.

Mo.—Caldwell v. Smith, 88 Mo. 44.

Pa.—Reese v. Reese, 157 Pa. St. 200, 27 Atl. 703.

S. C.—Brock v. Bowman, 1 Rich. Eq. Cas. 185.

Tenn.—Dillard v. Dillard, 22 Tenn. 41.

28. *N. Y.*—Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733.

Ark.—Toney v. McGehee, 38 Ark. 419.

Conn.—Paulk v. Cooke, 39 Conn. 566.

Md.—Spuck v. Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427.

N. J.—Claffin v. Mess, 30 N. J. Eq. 211.

S. C.—McElwee v. Sutton, 2 Bailey, 128.

Can.—Ferguson v. Kenny, 16 Ont. App. 276.

Eng.—Freeman v. Pope, L. R. 9 Eq. 206, 39 L. J. Ch. 148, 689, 21 L. T. Rep. N. S. 816, 18 Wkly. Rep. 399, 906, L. R. 5 Ch. 538; Jenkyn v. Vaughan, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214.

Contra.—Mayer v. Frasch, 7 Wash. 504, 35 Pac. 409.

29. *N. Y.*—Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733, where the debts owing at the time of the fraudulent conveyance were paid with the proceeds of credit subsequently acquired, the indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the subsequent debts unpaid were owing to the same creditors who held them at the time of the

§ 6. Knowledge or notice of fraudulent transaction.—As a general rule a conveyance made by a debtor cannot be attacked for fraud by a subsequent creditor who has acquired his claim with notice, either actual or constructive, of such conveyance.³⁰ But subsequent creditors are not debarred from attacking a deed made in pursuance of a scheme to defraud them merely because it is registered,³¹ and such a conveyance is void as against a subse-

conveyance; *Mills v. Morris*, 1 Hoffm. Ch. 419.

Ill.—*Thomas v. Lye*, 37 Ill. App. 482.

Iowa.—*Barhydt v. Perry*, 57 Iowa, 416, 10 N. W. 820.

S. C.—*McElwee v. Sutton*, 2 Bailey, 128.

Va.—*Wilson v. Buchanan*, 7 Gratt. 334.

Contra.—*First Nat. Bank v. Bayless*, 96 Ga. 684, 23 S. E. 851, such a conveyance is not void as to subsequent creditors in the absence of actual fraud.

30. *N. Y.*—*Baker v. Gilman*, 52 Barb. 26; *Pell v. Tredwell*, 5 Wend. 661. But see *Martin v. Walker*, 12 Hun, 46.

U. S.—*In re May*, 2 Fed. 845.

Conn.—*Smith v. Gaylord*, 47 Conn. 380.

Ga.—*Sims v. Albea*, 72 Ga. 751; *Brown v. Spivey*, 53 Ga. 155.

Ill.—*Henebery v. Johnson*, 95 Ill. App. 537.

Ind.—*Parke County Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73, 26 N. E. 884.

Iowa.—*Saunders v. King*, 119 Iowa, 291, 93 N. W. 272.

Kan.—*State Bank of Chase v. Chatten*, 69 Kan. 435, 77 Pac. 96; *Sheppard v. Thomas*, 24 Kan. 780.

Md.—*Kane v. Roberts*, 40 Md. 590; *Williams v. Banks*, 11 Md. 198; *Rob-*

erts v. Gibson, 6 Harr. & J. 116. But see *Scott v. Keane*, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359, a creditor who contracts with notice of a trust deed placing property of his debtor beyond the reach of creditors, and under which the debtor exercises all the rights of ownership, is not estopped to have such deeds declared fraudulent and against the policy of the law.

Miss.—*Donoghue v. Shull*, 85 Miss. 404, 37 So. 817.

Pa.—*Monroe v. Smith*, 79 Pa. St. 459; *Snyder v. Christ*, 39 Pa. St. 499; *Thomas v. Butler*, 16 Pa. Super Ct. 268.

S. C.—*Bank of South Carolina v. Ballard*, 12 Rich. 259; *Eigleberger v. Kibler*, 1 Hill Eq. 113, 26 Am. Dec. 192.

Tenn.—*Nelson v. Vanden*, 99 Tenn. 224, 42 S. W. 5; *Churchill v. Wells*, 7 Coldw. 364, actual notice necessary.

Tex.—*Lehmberg v. Biberstein*, 51 Tex. 457.

Va.—*Bank of Alexandria v. Patton*, 1 Rob. 499.

W. Va.—*Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869.

31. *Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453; *Matthai v. Heather*, 57 Md. 483; *Moore v. Blondheim*, 19 Md. 172; *Williams v. Banks*, 11 Md. 198.

quent creditor who had no knowledge thereof, though the conveyance was of record. The record is not constructive notice to subsequent creditors.³² In some jurisdictions it is held that notice to a creditor, at the time of the creation of his debt, of a prior conveyance made in fraud of creditors, will not affect such creditor's subsequent right to have the conveyance set aside.³³

§ 7. Creditors whose claims are barred or satisfied.—A creditor whose claim or judgment is barred by the statute of limitations cannot maintain a suit or bill in equity to set aside the debtor's conveyance as fraudulent and to subject to the payment of such claim or judgment property assigned or conveyed by the debtor in fraud of his creditors.³⁴ To enable a creditor to contest the validity of a conveyance by his debtor, he must have a judgment or a claim in full force; one which has been paid or satisfied is not sufficient. Where the claim of a creditor is satisfied and extinguished, or where property sold on execution is purchased by the judgment creditor for a sum sufficient to satisfy the same, he ceases to be a creditor of the judgment debtor,

32. *Marshall v. Roll*, 139 Pa. St. 399, 20 Atl. 999, 23 Am. St. Rep. 198; *Mahle v. Kurtz*, 9 Pa. Co. Ct. 280, 6 Kulp, 157.

33. *Ala.*—*Echols v. Peurring*, 107 Ala. 660, 18 So. 250.

Ky.—*O'Kane v. Vinnedge*, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; *Buffington v. Mosby*, 17 Ky. L. Rep. 1307, 34 S. W. 704, where the creditor was induced to extend credit by the debtor's representations that he made the conveyance only to defeat persons seeking an unjust judgment against him in another State, and that the creditor's debt would be paid. But see *Shipp v. Hibler*, 4 Ky. L. Rep. 47; *Hanson v. Power*, 38 Ky. 91.

Mont.—*Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145.

N. J.—*Spielman v. Knowles*, 50 N. J. Eq. 796, 27 Atl. 1033; *Receiver of Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571.

34. *Ala.*—*Herstein v. Walker*, 85 Ala. 37, 4 So. 262; *Merchants' Nat. Bank v. McGee*, 108 Ala. 304, 19 So. 356, claim against estate of deceased debtor not barred where there has been no administration on the estate; *Larkin v. Mead*, 77 Ala. 485.

La.—*Hopkins v. Buck*, 5 La. Ann. 487.

Miss.—*Fox v. Wallace*, 31 Miss. 660; *Edwards v. McGee*, 31 Miss. 143.

Or.—*Davis v. Davis*, 20 Or. 78, 25 Pac. 140.

Tex.—*McClenney v. McClenney*, 3 Tex. 192, 49 Am. Dec. 738.

and cannot attack prior or subsequent conveyances by such debtor, and seek to have them set aside as fraudulent.³⁵ One who has ceased to be a creditor with an enforceable lien cannot attack his debtor's conveyance.³⁶ A person designing to file a bill in aid of an execution, for the purpose of vacating an alleged fraudulent transfer of land, must do so before the sale; if he waits until after the sale, and the purchase of the land thereat by himself, the suit cannot be maintained.³⁷ The grantee of a judgment debtor who purchased at the execution sale cannot sue to set aside as fraudulent a deed made by the judgment debtor prior to the sale.³⁸ Where property sold on execution and

35. *N. Y.*—Weaver v. Toogood, 1 Barb. 238; Van Wyck v. Seward, 18 Wend. 375; Jackson v. Cadwell, 1 Cow. 622.

U. S.—Gottlieb v. Thatcher, 34 Fed. 435, where the creditor was held to have been in equity more than fully paid; Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729.

Ga.—Feagan v. Cureton, 19 Ga. 404.

Ind.—Voorhees v. Carpenter, 127 Ind. 300, 26 N. E. 838, where the debtor after the fraudulent conveyance made a general assignment and the trust had been executed and the assignee discharged.

Kan.—Robbins v. Sackett, 23 Kan. 301.

Mass.—Plimpton v. Goodell, 143 Mass. 365, 9 N. E. 791.

Neb.—Earle v. Burch, 21 Neb. 702, 33 N. W. 254.

Tenn.—Tyler v. Hamblin, 58 Tenn. 152. A conveyance cannot be set aside by creditors who compromised their claims after the conveyance was recorded. Landreth Co. v. Schevenel, 102 Tenn. 486, 52 S. W. 148.

Tex.—Willis v. Hudson, 72 Tex.

598, 10 S. W. 713; Hodges v. Taylor, 57 Tex. 196.

Vt.—Richards v. Hunt, 6 Vt. 251, 27 Am. Dec. 545, but a composition and discharge of the creditor's claim by false and fraudulent representations will not deprive the creditor of his rights.

Negligence in pursuing remedy.—The rule that giving time to the principal debtor discharges the surety does not apply in the case of a judgment creditor seeking to subject property voluntarily conveyed by the debtor, in the hands of the grantee, so as to make a stay of execution on the judgment by the plaintiff, under an arrangement for its payment by installments, a bar to the suit to subject the property in his hands, although the debt might certainly have been satisfied had the creditor proceeded in the usual manner. Hopkirk v. Randolph, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

36. Daugherty v. Powell, 67 Kan. 857, 72 Pac. 274, 74 Pac. 242.

37. Cranson v. Smith, 47 Mich. 189, 10 N. W. 194.

38. Helden v. Hellen, 80 Md. 616, 31 Atl. 506, 45 Am. St. Rep. 371.

purchased for the benefit of the creditor, is incumbered with a fraudulent mortgage, the creditor may, where the execution is satisfied, file a bill to set aside the mortgage.³⁹

§ 8. **Nature of claims of creditors.**—The statute of 13 Elizabeth relating to fraudulent conveyances, and the statutes based thereon enacted in various states in this country, embrace as creditors within the meaning of such statutes, as a general rule, all persons who have a valid cause of action.⁴⁰ A creditor's bill to set aside a conveyance by the debtor, as intended to defeat and delay the complainant, cannot be maintained by one who is not a *bona fide* creditor,⁴¹ or by one who is made a nominal creditor for the purpose of enabling the debtor through him to himself indirectly defeat a prior conveyance to a *bona fide* creditor.⁴² A conveyance cannot be avoided by a creditor whose claim is founded on an illegal consideration.⁴³ A suit or bill in equity

39. *Bailey v. Burton*, 8 Wend. (N. Y.) 339.

40. *N. Y.*—*Stimson v. Wrigley*, 86 N. Y. 332, a municipal corporation under a valid tax warrant; *Bowls v. Tompkins*, 18 Hun, 219, as overseer of the poor of a town had no cause of action; *Wilcox v. Fitch*, 20 Johns. 472, plaintiff in ejectment a creditor within the meaning of the statute of frauds.

Ala.—See *Schwartz v. Barley*, 142 Ala. 439, 38 So. 119, as the claim of a firm creditor against individual partners.

Ill.—*Walradt v. Brown*, 6 Ill. 397, 41 Am. Dec. 190.

Md.—*Welde v. Scotten*, 59 Md. 72; *Gebhart v. Merfeld*, 51 Md. 321.

Mass.—*Woodbury v. Sparrell Print*, 187 Mass. 426, 73 N. E. 547.

S. D.—*First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646.

Vt.—*Fairbanks v. Benjamin*, 50 Vt. 99.

Officers of court holding claims for costs are such creditors as may set aside their debtor's conveyance as fraudulent. *Chapman v. Chapman*, 13 Ind. 396.

A claim of a witness for attendance, etc., is such a debt or demand upon the party by whom he was summoned as is protected by the statute against fraudulent conveyances. *Worland v. Outten*, 33 Ky. 477.

41. *Townsend v. Tuttle*, 28 N. J. Eq. 449.

42. *Esty v. Long*, 41 N. H. 103.

43. *Ala.*—*Mohr v. Senior*, 85 Ala. 114, 4 So. 736, contract by married woman.

Mass.—*Alexander v. Gould*, 1 Mass. 165.

Minn.—*Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97, contract for purchase of land to be acquired under a presumption right.

attacking a conveyance as in fraud of creditors cannot be maintained by creditors whose claims are not due or before the maturity of the debt or claim.⁴⁴ A creditor who has taken a mortgage as security for his debt or claim can attack a prior fraudulent transfer or mortgage made by his mortgagor.⁴⁵

Miss.—*Edwards v. Mister*, 58 *Miss.* 765, contract with minor.

Pa.—*Hart v. Hart*, 5 *Watts*, 106.

Va.—*Burton v. Mill*, 78 *Va.* 468, a claim for breach of promise of marriage, though not reduced to judgment, is within the protection of the statute.

A note for liquors sold in the State without a license, though made in another State, being void through illegality of consideration, will not create the relation of debtor and creditor between the parties, so as to entitle the payee to question the validity of a sale made by the maker to a third person as fraudulent. *Fulfer v. Bean*, 30 *N. H.* 181.

Claims partially illegal.

Where a creditor seeks to set aside his debtor's conveyance and subject the property to certain claims, part of which are so tainted with illegality that equity will not enforce them, and part of which are valid and enforceable, but the creditor refuses to produce his accounts so as to enable the valid items to be distinguished from the illegal ones, the former must share the fate of the latter, and equity will refuse to aid him altogether. *Hanson v. Power*, 38 *Ky.* 91.

44. U. S.—*Adler v. Fenton*, 65 *U. S.* 407, 16 *L. Ed.* 696. But suit may be maintained where a note has been discounted and renewed from time to time, although the note is not yet due. *McLaughlin v. Bank of Potomac*, 48 *U. S.* 220, 12 *L. Ed.* 675.

Ala.—*McGhee v. Importers', etc., Nat. Bank*, 93 *Ala.* 192, 9 *So.* 734; *Freider v. Lienkauff*, 92 *Ala.* 469, 8 *So.* 758; *Jones v. Massey*, 79 *Ala.* 370.

Ind.—*Collins v. Nelson*, 81 *Ind.* 75; *Evans v. Thornburg*, 77 *Ind.* 106. But a mortgagee of chattels may sue for equitable relief against a subsequent fraudulent mortgage of the chattels, and a judgment foreclosing the same, although the debt secured is not yet due him, since he had a subsisting lien upon the property at the time of the fraudulent conveyance. *McCormick v. Hartley*, 107 *Ind.* 248, 6 *N. E.* 357.

Ky.—*United States Bank v. Huth*, 43 *Ky.* 423.

Mass.—*England v. Adams*, 157 *Mass.* 449, 32 *N. E.* 665.

Va.—*Simon v. Ellison*, 22 *S. E.* 860.

Compare *Stein v. Gibbons*, 16 *La.* 103, a debt on a note which has not yet matured has "accrued" so as to constitute the holder a creditor who can institute action; *Mowry v. Schroder*, 4 *Strobb.* (*S. C.*) 69, where the complainant alleges that the whole debt is lost, it is immaterial whether it was due before or after action was brought; *Reg v. Henry*, 21 *Ont.* 113.

45. N. Y.—*Anderson v. Hunn*, 5 *Hun*, 79, the holder of a second chattel mortgage may maintain an action to set aside a prior chattel mortgage on the ground of fraud, since his mortgage gives him a specific lien.

U. S.—*People's Sav. Bank v. Bates*,

§ 9. **Claims for torts.**—It is the established rule in most jurisdictions that the statute relating to fraudulent conveyances extends its protection to all persons having a valid cause of action or suit for damages arising from torts, as well as in contract.⁴⁶ Persons having a cause of action for damages for as-

120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754, under Michigan statute.

Ga.—Lee v. Brown, 7 Ga. 275.

Me.—Sprague v. Graham, 29 Me. 160.

Mich.—Fox v. Clark, Walk. 575.

Can.—Warren v. Taylor, 8 Can. L. J. O. S. 243, 9 Grant Ch. (U. C.) 59.

Eng.—Bartow v. Van heythuysen, 11 Hare, 126, 18 Jur. 344, 1 Wkly. Rep. 429, 45 Eng. Ch. 127; Bill v. Cureton, 4 L. J. Ch. 98, 2 Myl. & K. 503, 7 Eng. Ch. 503, 39 Eng. Reprint, 1036.

In New Jersey a creditor who accepts a chattel mortgage as security for his debt is held to be a purchaser, and cannot therefore, while relying on his mortgage, have a prior voluntary conveyance or mortgage by the mortgagee declared fraudulent as to him, since the statute of 27 Eliz. and the New Jersey statute based thereon apply only to realty. Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402.

46. N. Y.—Kain v. Larkin, 4 App. Div. 209, 38 N. Y. Supp. 546; Fuller v. Brown, 76 Hun, 557, 28 N. Y. Supp. 189; Hepworth v. Union Ferry Co., 62 Hun, 257, 16 N. Y. Supp. 692; Ford v. Johnston, 7 Hun, 563; Pendleton v. Hughes, 65 Barb. 136; Jackson v. Myers, 18 Johns. 425.

Ala.—Gunn v. Hardy, 130 Ala. 642, 31 So. 443.

Conn.—Fox v. Hills, 1 Conn. 295.

Ill.—Bongard v. Block, 81 Ill. 186, 25 Am. Rep. 276; Walradt v. Brown, 6 Ill. 397, 41 Am. Dec. 190.

Ind.—Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300; Shean v. Shay, 42 Ind. 375, 13 Am. Rep. 366; Pennington v. Clifton, 11 Ind. 162.

Iowa.—Wier v. Day, 57 Iowa, 84, 10 N. W. 304; Corder v. Williams, 40 Iowa, 582.

Me.—Tobie, etc., Mfg. Co. v. Waldron, 75 Me. 472.

Md.—Welde v. Scotten, 59 Md. 72.

Miss.—McInnis v. Wiscassett Mills, 78 Miss. 52, 28 So. 725.

Mo.—McCollum v. Crane, 101 Mo. App. 522, 74 S. W. 650.

N. J.—Thorpe v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; Boid v. Dean, 48 N. J. Eq. 193, 21 Atl. 618; Post v. Stiger, 29 N. J. Eq. 554; Scott v. Hartman, 26 N. J. Eq. 89.

N. D.—Soly v. Aasen, 10 N. D. 108, 86 N. W. 108.

Or.—Seed v. Jennings (1905), 83 Pac. 872.

S. C.—McAfee v. McAfee, 28 S. C. 188, 5 S. E. 480.

Tenn.—Patrick v. Ford, 37 Tenn. 532.

Tex.—Holden v. McLaury, 60 Tex. 228.

Vt.—Corey v. Morrill, 71 Vt. 51, 42 Atl. 976. But see Green v. Adams, 59 Vt. 602, 10 Atl. 742, 59 Am. Rep. 761.

Va.—Harris v. Harris, 23 Gratt. 737.

Wash.—Bates v. Drake, 28 Wash. 447, 68 Pac. 961.

Eng.—Crossley v. Elworthy, L. R. 12 Eq. 158, 40 L. J. Ch. 480, 24 L. T.

sault and battery,⁴⁷ bastardy,⁴⁸ breach of promise to marry,⁴⁹ seduction,⁵⁰ libel or slander,⁵¹ deceit,⁵² trespass,⁵³ or usury penalties,⁵⁴ are regarded as creditors within the meaning of such statutes and may attack their debtor's fraudulent conveyance made to defeat a recovery upon such claims. A person upon whom robbery has been committed has been held to be entitled to be considered as a creditor of the party committing the robbery.⁵⁵ A voluntary conveyance to defeat a claim of a third person to damages for a tort is void at common law as against such third person.⁵⁶ In some cases it has been held that a claimant for damages arising out of a tort is not a creditor within the

Rep. N. S. 607, 19 Wkly. Rep. 842; *Barling v. Bishopp*, 29 Beav. 417, 6 Jur. N. S. 812, 8 Wkly. Rep. 631, 54 Eng. Reprint, 689; *Strong v. Strong*, 18 Beav. 408, 52 Eng. Reprint, 161. But see *Leukener v. Freeman*, 2 Freem. 236, 22 Eng. Reprint, 1182, Prec. Ch. 105, 24 Eng. Reprint, 51.

47. *Martin v. Walker*, 12 Hun (N. Y.) 46; *Anglin v. Conley*, 114 Ky. 741, 71 S. W. 926, 24 Ky. L. Rep. 1551; *Slater v. Sherman*, 5 Bush. (Ky.) 206; *Floyd v. Martin*, 4 Ky. L. Rep. 891.

48. *Bishop v. Redmond*, 83 Ind. 157; *Schuster & Co. v. Stout*, 30 Kan. 529, 2 Pac. 642; *Leonard v. Bolton*, 153 Mass. 428, 26 N. E. 1118; *Pierstoff v. Jorge*s, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881.

49. *Thompson v. Robinson*, 89 Me. 46, 35 Atl. 1002; *McVeigh v. Ritenour*, 40 Ohio St. 107; *Smith v. Culbertson*, 9 Rich. (S. C.) 106; *Lowry v. Pinson*, 2 Bailey (S. C.), 324, 23 Am. Dec. 140; *Hoffman v. Junk*, 51 Wis. 613, 8 N. W. 493.

50. *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Bishop v. Redmond*, 83 Ind. 157; *Carbiener v. Mont-*

gomery, 97 Iowa, 659, 66 N. W. 900; *McKenna v. Crowley*, 16 R. I. 364, 17 Atl. 354.

51. *Cal.*—*Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709.

Ill.—*Walradt v. Brown*, 6 Ill. 397, 41 Am. Dec. 190.

Ky.—*Lillard v. McGee*, 7 Ky. 165.

Me.—*Hall v. Sands*, 52 Me. 355.

Md.—*Gebhart v. Merfeld*, 51 Md. 322; *Cooke v. Cooke*, 43 Md. 522.

Tenn.—*Farnsworth v. Bell*, 5 Sneed, 531.

Contra.—*Fowler v. Frisbie*, 3 Conn. 320.

52. *Miner v. Warner*, 2 Grant (Pa.), 448.

53. *Westmoreland v. Powell*, 59 Ga. 256; *Gebhart v. Merfeld*, 51 Md. 322; *Schaible v. Ardner*, 98 Mich. 70, 56 N. W. 1105; *Paul v. Crooker*, 8 N. H. 288.

54. *Heath v. Page*, 63 Pa. St. 108, 3 Am. Rep. 533.

55. *Reid v. Kennedy*, 21 Grant Ch. (U. C.) 86.

56. *Fowler v. Frisbie*, 3 Conn. 320; *Fox v. Hills*, 1 Conn. 295; *Lillard v. McGee*, 7 Ky. 165.

purview of the statute until the claim has been reduced to judgment.⁵⁷

§ 10. **Claims for alimony.**—A wife, having a right as against her husband to support and maintenance, is to that extent a present and continuing creditor of her husband, and within the protection of the statutes as to fraudulent conveyances, and is entitled to bring suit to set aside a conveyance of his property by her husband made to prevent the recovery of alimony, or to avoid the payment of alimony decreed to her, or to defraud her of alimony or maintenance, and to subject the property conveyed to the satisfaction of a judgment for alimony; and a judgment for alimony is not always held to be a necessary prerequisite to entitle her to do so.⁵⁸ A conveyance of his prop-

57. Me.—*Meserve v. Dyer*, 4 Me. 52.

Mich.—*Hill v. Bowman*, 35 Mich. 191.

Miss.—*Jones v. Jones*, 79 Miss. 261, 30 So. 651.

Ohio.—*Detwiler v. Louison*, 18 Ohio Cir. Ct. 434, 10 Ohio Cir. Dec. 95.

Tenn.—*Langford v. Fly*, 7 Humphr. 585.

58. Colo.—*Hall v. Harrington*, 7 Colo. App. 474, 44 Pac. 365, a deed fraudulently executed by a husband to defeat his wife's claim for alimony in a pending suit cannot be held valid as against the judgment for alimony when rendered.

Ill.—*Scott v. Magloughlin*, 133 Ill. 33, 24 N. E. 1030, *aff'g* 33 Ill. App. 162, equity will not foreclose a trust deed given to defraud the grantor's wife of alimony or maintenance in a divorce proceeding then pending; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642, wife a creditor under Illinois statute.

Ind.—*DeRuiter v. DeRuiter*, 28 Ind.

App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Iowa.—*Picket v. Garrison*, 76 Iowa, 347, 41 N. W. 38.

Me.—*Bailey v. Bailey*, 61 Me. 361.

Md.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375, the words "creditors and others," in the statute of 13 Eliz., chap. 5, includes a wife.

Mich.—*Holland v. Holland*, 121 Mich. 109, 79 N. W. 1102, 6 Det. L. N. 379.

Minn.—*Cochran v. Cochran*, 96 Minn. 523, 105 N. W. 183, may bring suit after decree.

Ohio.—*Chittenden v. Chittenden*, 22 Ohio Cir. Ct. 498, 12 Ohio Cir. Dec. 526.

Pa.—*Bonslough v. Bonslough*, 68 Pa. St. 495.

Tex.—*Schultz v. Shultze* (Tex. Civ. App.), 66 S. W. 56; *Lott v. Kaiser*, 61 Tex. 673.

Vt.—*Green v. Adams*, 59 Vt. 602, 59 Am. Rep. 761.

Wis.—*Damon v. Damon*, 28 Wis. 515.

erty by a husband made with intent to defraud his wife of alimony or maintenance is fraudulent as to his wife, although the conveyance may have been made prior to the institution of the proceedings for divorce.⁵⁹

§ 11. **Persons representing creditors; Assignees.**—An assignee for creditors may maintain a suit to set aside a fraudulent conveyance made by the assignor.⁶⁰ An assignee in bankruptcy may maintain an action to annul a fraudulent transfer by the bankrupt, and recover the property or its avails for the benefit of simple contract creditors.⁶¹ The right to attack a conveyance as being in fraud of creditors is not personal to the original creditor, but may be exercised by his successors or assigns whenever he might have done so.⁶² The rule that a cause of action for fraud

59. *Gregory v. Filbeck*, 12 Colo. 379, 21 Pac. 489; *Platner v. Platner*, 66 Iowa, 378, 23 N. W. 764; *Weber v. Rothschild*, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162; *Blenkinsopp v. Blenkinsopp*, 1 DeG. M. & G. 495, 16 Jur. 787, 21 L. J. Ch. 401, 50 Eng. Ch. 379, 42 Eng. Reprint, 644.

60. *McMahon v. Allen*, 35 N. Y. 403.

61. *Southard v. Benner*, 72 N. Y. 424.

62. N. Y.—*In re Cornell*, 110 N. Y. 351, 18 N. E. 142; *Bostwick v. Scott*, 40 Hun, 212.

Ala.—*Jones v. Smith*, 92 Ala. 455, 9 So. 179; *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384; *Bragg v. Paterson*, 85 Ala. 233, 4 So. 716; *Fearn v. Ward*, 80 Ala. 555, 2 So. 114.

Cal.—*Windhaus v. Bootz* (1890), 25 Pac. 404; *Hobart v. Tyrrell*, 68 Cal. 12, 8 Pac. 525.

Colo.—*Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342. But see *Kaufman v. Burchinell*, 15 Colo. App. 520, 63 Pac. 786.

Conn.—*Shipman v. Aetna Ins. Co.*, 29 Conn. 245.

Iowa.—*Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708.

Me.—*Simpson v. Warren*, 55 Me. 18; *Warren v. Williams*, 52 Me. 343.

Md.—*Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708; *Waters v. Dashiell*, 1 Md. 455.

Mass.—*Freeland v. Freeland*, 102 Mass. 475; *Lynde v. McGregor*, 95 Mass. 172; *Blake v. Sawin*, 92 Mass. 340; *Gibbs v. Thayer*, 60 Mass. 30.

Mich.—*Noble v. McKeith*, 127 Mich. 163, 86 N. W. 526; *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899.

Miss.—*Cook v. Ligger*, 54 Miss. 368.

N. J.—*Wimpfheimer v. Perrine* (1901), 50 Atl. 356. See *Winans v. Graves*, 43 N. J. Eq. 263, 11 Atl. 25.

Ohio.—*Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741; *Hallowell v. Bayliss*, 10 Ohio St. 536.

Pa.—*Tams v. Bullitt*, 35 Pa. St. 308; *Moncure v. Hanson*, 15 Pa. St. 385.

R. I.—*Doyle v. Peckham*, 9 R. I. 21.

is not assignable does not apply to a contractual debt as the basis of a suit to set aside fraudulent conveyances.⁶³ The assignment by a trustee in bankruptcy, however, of the mere right to set aside a fraudulent conveyance by the bankrupt is invalid.⁶⁴

§ 12. **Receivers in supplementary proceedings.**—It is the general rule, under statutes providing for the appointment of a receiver in proceedings supplementary to execution, that the receiver appointed represents the interests of the creditors as well as those of the debtor and is a trustee for all parties, and has power to assail and set aside such acts of the debtor as are illegal and forbidden by law, and may, therefore, institute actions in his own name to avoid and set aside conveyances made by the debtor with intent to defraud his creditors.⁶⁵ The receiver is

Va.—*Staton v. Pittman*, 11 Gratt. 99; *Clough v. Thompson*, 7 Gratt. 26; *Shirley v. Long*, 6 Rand. 735.

Wash.—*Bates v. Drake*, 28 Wash. 447, 68 Pac. 961.

W. Va.—*Highland v. Highland*, 5 W. Va. 63.

Wis.—*Sutton v. Hasey*, 58 Wis. 556, 17 N. W. 416.

Compare Carrigan v. Byrd, 23 S. C. 89; *Pierce v. Bowers*, 67 Tenn. 353; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 506; *Lumsden v. Scott*, 4 Ont. 323.

63. *Howd v. Breckenridge*, 97 Mich. 65, 56 N. W. 221.

64. *Annis v. Butterfield*, 99 Me. 181, 58 Atl. 898.

65. *N. Y.*—*Kennedy v. Thorpe*, 51 N. Y. 174, where one from whom goods have been fraudulently purchased sues for the price and gets judgment, a receiver in supplementary proceedings upon such judgment may not set up the fraud in the sale to defeat an assignment of the property made by the purchaser for the benefit

of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof to the assignee; *Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519; *Manley v. Rasiga*, 13 Hun. 288; *Bennett v. McGuire*, 58 Barb. 625; *Gere v. Dibble*, 17 How. Pr. 31. The earlier cases of *Hayner v. Fowler*, 16 Barb. 300, and *Seymour v. Wilson*, 16 Barb. 294, holding to the contrary, were overruled by *Porter v. Williams*, *supra*.

U. S.—*Olney v. Tanner*, 18 Fed. 636, 21 Blatchf. 540, but such a receiver cannot maintain a suit to reach property which was transferred by a bankrupt in fraud of creditors before he was appointed receiver, and when there is an assignee in bankruptcy; in such cases the assignee in bankruptcy is the only person who can assail such transfer.

Mich.—*Prescott v. Pfeiffer*, 57¹ Mich. 21, 23 N. W. 477.

Minn.—*Dunham v. Byrnes*, 36 Minn. 106, 30 N. W. 402.

a trustee for all, clothed with power to set aside transfers, fraudulent as against demands represented by him, only to an extent sufficient to satisfy such demands and costs.⁶⁶

§ 13. **Sureties and endorsers.**—It is held in some cases that the relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance made by the former, commences at the date of the obligation or the date of signing the surety bond, and not from the time the surety makes payment, and in other cases that the payment by the surety of the debt of his principal relates back to the date of the bond, and constitutes the surety a creditor, who may avoid a fraudulent conveyance made by the principal during the period the claim was contingent, while other cases hold that where a voluntary conveyance, void as to a subsisting creditor, is made by a principal debtor, and afterwards the surety pays the debt, the latter becomes himself the creditor and will be substituted or subrogated to the rights of the creditor, and may subject the property so conveyed to the payment of his debt.⁶⁷ So an ac-

N. J.—*Miller v. Mackenzie*, 29 N. J. Eq. 291. But compare *Higgins v. Gillesheimer*, 26 N. J. Eq. 308, a receiver appointed under the act to prevent fraudulent trusts and assignments (*Nix Dig.*, p. 297) has no power to impeach a grant made by the debtor in fraud of creditors.

Wis.—*Hamlin v. Wright*, 23 Wis. 491.

66. *Bostwick v. Menck*, 40 N. Y. 383.

67. *N. Y.*—*Martin v. Walker*, 12 Hun, 46.

U. S.—*Thompson v. Crane*, 73 Fed. 327.

Ala.—*Washington v. Norwood*, 128 Ala. 383, 30 So. 405; *Jenkins v. Lockard*, 66 Ala. 377; *Cato v. Easley*, 2 Stew. 214.

Ark.—*Williams v. Bizzell*, 11 Ark. 716.

Ga.—*Banks v. McCandless*, 119 Ga. 793, 47 S. E. 332.

Ill.—*Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Dunphy v. Gorman*, 29 Ill. App. 132.

Ind.—*Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747.

Ky.—*Partlow v. Lane*, 42 Ky. 424, 39 Am. Dec. 473; *Poynter v. Mallory*, 20 Ky. L. Rep. 284, 45 S. W. 1042; *Johnson v. Harrison*, 6 Ky. L. Rep. 591.

Me.—*Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240; *Danforth v. Robinson*, 80 Me. 466, 15 Atl. 27, 6 Am. St. Rep. 224; *Sargent v. Salmond*, 27 Me. 539; *Howe v. Ward*, 4 Me. 195.

Miss.—*Ames v. Dorroh*, 76 Miss.

accommodation endorser of a note who has been compelled to pay it is a creditor of the maker within the statute prohibiting fraudulent conveyances, and is therefore entitled to maintain an action to vacate and set aside such a conveyance, and subject the property to his claim for reimbursement.⁶⁸ A surety is a creditor of his co-obligor in the same way and the same rules apply as between co-sureties.⁶⁹

§ 14. **Purchasers at judicial sales.**—A purchaser at a judicial sale has the same right as the judgment creditor to attack a prior conveyance made by the judgment debtor as being fraudulent as against creditors.⁷⁰ He may impeach the conveyance in

187, 23 So. 768, 71 Am. St. Rep. 522; Loughridge v. Bowland, 52 Miss. 546.

N. C.—Tatum v. Tatum, 36 N. C. 113.

Tenn.—Williams v. Tipton, 5 Humphr. 66, 42 Am. Dec. 420; Shapira v. Paletz (Ch. App.), 59 S. W. 774; Oneal v. Smith, 10 Lea, 340.

Va.—Curd v. Miller, 7 Gratt. 185.

W. Va.—Hawker v. Moore, 40 W. Va. 49, 20 S. E. 848.

Wis.—Ellis v. Southwestern Land Co., 108 Wis. 313, 84 N. W. 417, 81 Am. St. Rep. 909.

68. Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; Severs v. Dodson, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641; Phelps v. Morrison, 24 N. J. Eq. 195. *Compare*, however, Mason v. Somers (N. J. Ch.), 45 Atl. 602, an accommodation endorser does not thereby become a creditor of the maker so as to raise a presumption that the maker's subsequent voluntary conveyance is fraudulent.

69. Washington v. Norwood, 128 Ala. 383, 30 So. 405; Jenkins v. Lockard, 66 Ala. 377; Gibson v. Love, 4 Fla. 217; Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240; Pashby v. Man-

digo, 42 Mich. 172, 3 N. W. 927; Smith v. Rumsey, 33 Mich. 183.

70. *N. Y.*—Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082, *aff'd* 11 N. Y. Supp. 1139, 19 Civ. Proc. R. 363; Berger v. Carman, 79 N. Y. 146, *rev'd* Snedeker v. Snedeker, 18 Hun, 355; Sands v. Hildreth, 14 Johns. 493; Hildreth v. Sands, 2 Johns. Ch. 35.

U. S.—Farrar v. Bernheim, 74 Fed. 435, 20 C. C. A. 496; Middleton v. Sinclair, 17 Fed. Cas. No. 9,534, 5 Cranch C. C. 409.

Ga.—Murray v. Jones, 50 Ga. 109.

Ill.—Murphy v. Orr, 32 Ill. 489.

Ind.—Frakes v. Brown, 2 Blackf. 295.

Ky.—Fuller v. Pinson, 98 Ky. 441, 33 S. W. 399, 17 Ky. L. Rep. 1002; Shiveley v. Jones, 45 Ky. 274.

Mass.—Gerrish v. Mace, 9 Gray, 235.

Mich.—Watson v. Mead, 98 Mich. 330, 57 N. W. 181.

Minn.—Millis v. Lombard, 32 Minn. 259, 20 N. W. 187.

Miss.—Mays v. Rose, 1 Freem. Ch. 703.

Mo.—Lindell Real Estate Co. v. Lindell, 113 Mo. 386, 33 S. W. 466,

a suit at law to recover possession, or if he can gain possession defend the title thus acquired against the fraudulent grantee or those claiming under him.⁷¹ But a purchaser at an execution or other judicial sale, with notice, actual or constructive, of a prior conveyance by the judgment debtor, cannot assail such conveyance as fraudulent.⁷² Upon a question respecting a fraudulent conveyance, a purchaser under a judgment against the grantor will be considered as a creditor, and not as a purchaser,⁷³ and he stands in no better situation than the judgment creditor who files a bill to avoid the conveyance.⁷⁴ Where a creditor is estopped, by participation in a fraudulent conveyance, from afterwards questioning it, a purchaser at execution sale under such creditor's judgment is likewise precluded from doing so.⁷⁵

§ 15. Officers levying attachment or execution.—A sheriff taking property under an attachment process duly issued may

and a decree setting the conveyance aside is not vitiated by the facts that the sale was void and that the purchaser hence acquired no title thereunder; *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559; *Wood v. Augustine*, 61 Mo. 46, but he cannot do so without showing an equitable or legal title in himself; *Gentry v. Robinson*, 55 Mo. 260; *Ryland v. Callison*, 54 Mo. 513; *Dunnica v. Coy*, 28 Mo. 525, 75 Am. Dec. 133.

Ohio.—*Barr v. Hatch*, 3 Ohio, 527.

Or.—*Wood v. Fisk*, 45 Or. 276, 77 Pac. 128, 738.

Pa.—*Ferris v. Irons*, 83 Pa. St. 179.

R. I.—*Belcher v. Arnold*, 14 R. I. 613.

S. C.—*McGee v. Jones*, 34 S. C. 146, 13 S. E. 326; *Ford v. Aiken*, 4 Rich. L. 121; *Caston v. Cunningham*, 3 Strobb. 59.

Wis.—*Eastman v. Schettler*, 13 Wis. 324.

Contra.—*Thigpen v. Pitt*, 54 N. C. 49, the creditor's claim being satisfied he no longer has any rights to which the purchaser may be subrogated.

71. *Smith v. Reid*, *supra*, and other N. Y. cases.

72. *Abbott v. Hurd*, 7 Blackf. (Ind.) 510; *Davis v. Briscoe*, 81 Mo. 27. But see *Lawrence v. Lippencott*, 5 N. J. Eq. 473, a purchaser will be protected in his purchase though he knew of such previous conveyance; *McGee v. Jones*, 34 S. C. 146; *Ford v. Aiken*, 4 Rich. L. (S. C.) 121, notice had by the purchaser is immaterial if the judgment creditor had no notice of the conveyance.

73. *Pepper v. Carter*, 11 Mo. 540.

74. *Smith v. Espy*, 9 N. J. Eq. 160.

75. *Sharpe v. Davis*, 76 Ind. 17.

defend, in an action for possession brought by the vendee or assignee of the attachment debtor, by showing that the sale was fraudulent as against creditors.⁷⁶ None but creditors or purchasers can take advantage of a fraudulent deed, but a sheriff in attaching the property in the hands of one to whom it has been fraudulently conveyed, is the lawfully authorized agent of the creditors.⁷⁷ In replevin for property attached as belonging to a third person, the sheriff cannot justify by proof that it was transferred by such third person to the plaintiff in the replevin under a fraudulent contract of sale.⁷⁸

§ 16. **Personal representatives.**—The personal representative of a deceased debtor stands as trustee for his creditors and for their benefit may disaffirm and treat as void any transfer or agreement made in fraud of the rights of any creditor interested in any property or right belonging to the estate he represents, and it is his right and duty to institute proceedings to set aside a conveyance made by his decedent which was fraudulent as to his creditors.⁷⁹ In many jurisdictions, either by special statutes conferring this power or by judicial construction of statutes, a personal representative is authorized and empowered to bring an action or take proceedings to set aside a fraudulent conveyance

76. *N. Y.*—*Rinchev v. Stryker*, 23 *N. Y.* 45, 84 *Am. Dec.* 324; *Hall v. Stryker*, 27 *N. Y.* 596; *Thayer v. Willet*, 18 *N. Y. Super. Ct.* 344, 9 *Abb. Prac.* 325.

Cal.—*Bolander v. Gentry*, 36 *Cal.* 105, 95 *Am. Dec.* 162.

Mass.—See *Bond v. Endicott*, 149 *Mass.* 282, 21 *N. E.* 361.

Mich.—*Pierce v. Hill*, 35 *Mich.* 194, 24 *Am. Rep.* 541; *Haynes v. Ledyard*, 33 *Mich.* 319.

N. H.—*Walker v. Lovell*, 28 *N. H.* 138, 61 *Am. Dec.* 605.

S. C.—*Paris v. Du Pre*, 17 *S. C.* 282.

S. D.—See *Griswold v. Sundback*, 6 *S. D.* 269, 60 *N. W.* 1068, where defendant had relinquished his lien he was precluded from questioning the *bona fides* of a prior sale of the property by the debtor to plaintiff.

77. *Swanzy v. Hunt*, 2 *Nott & M.* (S. C.) 211.

78. *Deutsch v. Reilly*, 57 *How. Pr.* (N. Y.) 75.

79. *N. Y.*—*National Bank of West Troy v. Levy*, 127 *N. Y.* 549, 28 *N. E.* 592, *rev'g* 2 *N. Y. Supp.* 162; *Harvey v. McDonnell*, 113 *N. Y.* 526, 21 *N. E.* 695.

made by his decedent.⁸⁰ In other jurisdictions, the right of an executor or administrator to maintain a suit or action to impeach and set aside a conveyance of property made by his decedent, as fraudulent as against his creditors, is denied.⁸¹ The personal representative's right to sue is not exclusive and the creditor's right to prosecute such an action remains.⁸² Where the administrator or executor, upon application of a creditor, refuses to pursue his remedy and set aside a fraudulent conveyance and reclaim the property, the creditor may bring an action for himself and the other creditors, making the personal representatives parties.⁸³

§ 17. **Estoppel and waiver.**—In general.—Where the complainant in a suit to set aside a voluntary or fraudulent conveyance has not sought or received any benefit from the conveyance, or caused the defendant to forego any rightful advant-

80. *Cal.*—Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

Ind.—Jarrell v. Brubaker, 115 Ind. 260, 49 N. E. 1050.

Mass.—Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370.

Mich.—Beith v. Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402.

N. H.—Matthews v. Hutchins, 68 N. H. 412, 40 Atl. 1063.

N. C.—Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949.

Ohio.—Hoffman v. Kiefer, 19 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304.

Pa.—Stewart v. Kearney, 6 Watts, 453, 31 Am. Dec. 482.

Vt.—McLane v. Johnson, 43 Vt. 48.

Wis.—Eckler v. Wolcott, 115 Wis. 19, 90 N. W. 1081.

81. *Ala.*—Davis v. Swanson, 54 Ala. 277, 25 Am. Rep. 678.

Ark.—Matlock v. Bledsoe (Ark. 1905), 90 S. W. 848, assignment of

life policy; Anderson v. Dunn, 19 Ark. 650.

D. C.—Tierney v. Corbett, 2 Mackey, 264.

Ga.—Anderson v. Brown, 72 Ga. 713.

Ill.—Majorowicz v. Payson, 153 Ill. 484, 39 N. E. 127.

Kan.—Crawford v. Lehr, 20 Kan. 509.

Miss.—Blake v. Blake, 53 Miss. 182.

Mo.—Hall v. Callahan, 66 Mo. 316.

R. I.—Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785.

Tex.—Wilson v. Denander, 71 Tex. 603, 9 S. W. 678.

Va.—Spoonier v. Hilbish, 92 Va. 333, 23 S. E. 751.

W. Va.—Jones v. Patton, 10 W. Va. 653.

82. Hoffman v. Kiefer, 19 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304.

83. National Bank of West Troy v. Levy, 127 N. Y. 549; Harvey v. McDonnell, 113 N. Y. 526.

age in respect to the subject matter or defense of the suit, he is not estopped to invoke relief. It is an essential element of estoppel by conduct that the party claiming the estoppel shall have relied upon the words or conduct of the other, and have been induced by them to do something which he otherwise would not have done.⁸⁴ There must have been such a benefit conferred upon the creditor or disadvantage suffered by the vendee as ought to bind the conscience of the creditor or clothe his act with the character of a contract, in order to estop him from attacking the conveyance on the ground of fraud.⁸⁵ A creditor joining in a deed of partition after his debtor has made a fraudulent conveyance of his interest in the land partitioned does not thereby waive his right to maintain a bill to subject his debtor's interest in the land to the payment of his debt, where the partition deed recited that it should in no wise prejudice the creditor from maintaining such bill.⁸⁶

§ 18. **Knowledge or assent.**—A pre-existing creditor's right to avoid a conveyance which is fraudulent as to him is not affected by his mere knowledge of the fraud at the time the conveyance was executed,⁸⁷ in the absence of evidence that he knew the debtor was thereby depriving himself of the means to pay his debt,⁸⁸ or that the creditor knowing the purpose of the conveyance, assented to it and that such assent, induced the holder of the property to accept it.⁸⁹ But a conveyance in fraud of creditors is valid as to a creditor who has full knowl-

84. *Geiler v. Littlefield*, 148 N. Y. 603, 43 N. E. 66, one who has a contract to do work on certain premises does not, by performing the work under a new contract with a transferee of such premises, estop himself to claim as a judgment creditor of the transferor that the transfer was fraudulent, at least as to other premises included in the transfer; *Wood v. Potts & Potts*, 140 Ala. 425, 37 So. 253; *First Nat. Bank v. Maxwell*, 123

Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; *Woodson v. Carson*, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

85. *Corbitt v. Cutcheon*, 79 Mich. 41, 44 N. W. 163.

86. *Stout v. Stout*, 77 Ind. 537.

87. *Fitch v. Corbett*, 64 Cal. 150, 28 Pac. 231; *Armstrong Co. v. Elbert*, 14 Tex. Civ. App. 141, 36 S. W. 139.

88. *Cole v. Tyler*, 65 N. Y. 73.

89. *Graves v. Blondell*, 70 Me. 190; *Dingley v. Robinson*, 5 Me. 127.

edge of and assents or agrees to the conveyance, and cannot be avoided by such creditor on that ground,⁹⁰ either as to a previous debt, or a debt subsequently assigned to him by a third person.⁹¹

§ 19. **Affirmance or ratification.**—Where a creditor has subsequently ratified or affirmed his debtor's fraudulent transfer of property, he is estopped from assailing it as fraudulent.⁹² Mere notice of a fraudulent conveyance without any action on the part of a creditor will not amount to a confirmation; but if, with notice of the fraud, either actual or constructive, the creditor agrees upon consideration to confirm it, or makes any statement or agreement to that effect upon the faith of which the grantee acts as he would not otherwise, or if the creditor acts in such manner that the subsequent assertion of his rights, if permitted, would be a fraud, he will be held to have assented to or

90. *N. Y.*—Scholey v. Worcester, 4 Hun, 302, 6 Thomp. & C. 574; Pell v. Tredwell, 5 Wend. 661.

Ala.—Wooten v. Robins, 128 Ala. 373, 30 Sp. 681.

Ind.—Smith v. Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000.

La.—Wright v. Hogan, 11 La. Ann. 563.

Mo.—Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002.

Pa.—Mitchell v. Mitchell, 212 Pa. St. 62, 61 Atl. 570; Zuver v. Clark, 104 Pa. St. 222.

91. Pell v. Tredwell, 5 Wend. (N. Y.) 661.

92. *Ala.*—Wooten v. Robins, 128 Ala. 373, 30 So. 681, and he cannot successfully assail the same upon becoming a creditor of the fraudulent grantor subsequent to such assent or ratification.

Colo.—Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447.

Fla.—Simon v. Levy, 36 Fla. 438, 18 So. 777.

Mass.—Oriental Bank v. Haskins, 44 Mass. 332, 37 Am. Dec. 140.

Minn.—Hathaway v. Brown, 22 Minn. 214.

Mo.—Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002.

Neb.—Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236.

Ohio.—Rennick v. Bank of Chillicothe, 8 Ohio, 530.

Pa.—Appeal of Byrod, 31 Pa. St. 241.

S. C.—Kid v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Can.—Blackley v. Kenny, 16 Ont. App. 522.

Eng.—Oliver v. King, 8 DeG. M. & G. 110, 2 Jur. N. S. 312, 25 L. J. Ch. 427, 4 Wkly. Rep. 382, 57 Eng. Ch. 86, 44 Eng. Reprint, 331. See also Assent or confirmation by creditors, chap. III, § 8, *supra*.

ratified the transaction.⁹³ Where plaintiff, by a formal authenticated act, recognized defendant's title to property, he is estopped to allege that the conveyance as to him was fraudulent.⁹⁴ A creditor is not estopped from assailing as fraudulent a conveyance of real estate by his debtor by the fact that he afterwards, in ignorance of the fraud, accepted from the grantee the benefit of a deed of trust of a portion thereof,⁹⁵ or because he treated a subsequent partition of the premises as legal and sought to subject to the payment of his claim the portion of the premises set apart to his debtor's grantee,⁹⁶ or by garnishing the grantee who had possession of the property.⁹⁷

§ 20. **Participation.**—Where the evidence shows that the complainant in a bill to set aside a fraudulent conveyance had participated in, advised, or instigated such conveyance, the court, as a general rule, will leave him in the position he has made for himself, and will hold him estopped by his conduct from attacking the conveyance. Where he not only consents to the act but himself performs or assists in performing it, the maxim, *volenti non fit injuria*, is certainly applicable.⁹⁸ But it has

93. *Wooten v. Robins*, 128 Ala. 373, 30 So. 681. See also cases cited in note 92.

94. *Theriot v. Michel*, 28 La. Ann. 107.

95. *Baldwin v. Tuttle*, 23 Iowa, 66.

96. *Staples v. Bradley*, 23 Conn. 167, 60 Am. Dec. 630.

97. *Armstrong Co. v. Elbert*, 14 Tex. Civ. App. 141, 36 S. W. 139.

98. *N. Y.*—*Phillips v. Wooster*, 36 N. Y. 412, 3 Abb. Pr. N. S. 475.

U. S.—*Bacon v. Harris*, 62 Fed. 99, where the creditor united with his debtor in concealing the indebtedness and the existence of a bill of sale to secure it, to enable the debtor to obtain credit.

Ill.—*Perisho v. Perisho*, 95 Ill.

App. 644; *Dobbins v. Cruger*, 108 Ill. 188.

Ind.—*Reagan v. First Nat. Bank*, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000; *Sharpe v. Davis*, 76 Ind. 17.

Ky.—*Bull v. Harris*, 57 Ky. 195.

Mich.—*Bunce v. Bailey*, 39 Mich. 192.

Mo.—*Thompson v. Cohen*, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885; *Bobb v. Bobb*, 99 Mo. 578, 12 S. W. 893.

N. J.—*Schenck v. Hart*, 32 N. J. Eq. 774; *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 477; *Smith v. Espy*, 9 N. J. Eq. 160.

Pa.—*McDonald v. O'Neill*, 161 Pa. St. 245, 28 Atl. 1081; *French v. Mehan*, 56 Pa. St. 286.

been held that a fraudulent conveyance, made by the advice and at the request of a creditor of the grantor, is not valid as against that creditor;⁹⁹ that the grantee of land conveyed by an intestate in his lifetime with intent to defraud creditors, who has acted on such conveyance and is himself a creditor, is not estopped thereby, as one of the creditors of the estate, from availing himself of the fraudulent character of the conveyance;¹ and that a niece who participated in a fraudulent transfer by her uncle, in view of the unequal condition of the parties, was not thereby estopped from afterwards subjecting the property so conveyed to her claim.² Where a creditor is estopped by participation in a fraudulent conveyance from afterwards questioning it, a purchaser at an execution sale under the creditor's judgment is likewise precluded from doing so.³ A creditor who did not in any way participate in the fraud attempted to be practiced may assail a fraudulent conveyance.⁴

§ 21. **Receipt of benefit under conveyance.**—It is the general rule that a creditor who, with a full knowledge of the vitiating circumstances of the transaction, seeks or accepts a benefit under a conveyance fraudulent as to creditors, thereby elects to affirm it, and is thereby estopped from afterwards questioning its validity and vacating the conveyance as fraudulent.⁵ A pur-

Tex.—*Jacobs v. Jefferson Lumber Co.* (Tex.) 15 S. W. 236.

99. *Waterhouse v. Benton*, 5 Day (Conn.), 136.

1. *Norton v. Norton*, 59 Mass. 524.

2. *Schmelz v. Michelson*, 8 Ohio Dec. 538, 8 Wkly. L. Bul. 304.

3. *Sharpe v. Davis*, 76 Ind. 17.

4. *Woodson v. Carson*, 135 Mo. 521, 37 S. W. 197.

5. *Ala.*—*Mobile Sav. Bank v. McDonnell*, 87 Ala. 736, 6 So. 703; *Butler v. O'Brien*, 5 Ala. 316. See, however, *Proskauer v. People's Sav. Bank*, 77 Ala. 257.

Ark.—*Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547.

Ind.—*Reagan v. First Nat. Bank*, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

Minn.—*Lemay v. Bibeau*, 2 Minn. 291.

Mo.—*Torreyson v. Turnbaugh*, 105 Mo. App. 439, 79 S. W. 1002; *Gutzwiller v. Lackman*, 23 Mo. 168, but in an action by attachment, in which an interpleader claims the attached property under a previous transfer

chaser at an execution sale who pays a less price for the land by reason of there being an apparently valid lien on the property or by reason of its being clouded by the judgment debtor's prior fraudulent conveyance, having thus received a benefit from the existence of such lien or conveyance, is estopped from afterwards attacking such conveyance or bringing suit to set aside such incumbrance as in fraud of his rights.⁶ Where one purchases at a foreclosure sale had under the express condition that it is made subject to certain judgments, he cannot afterwards assail such judgments as fraudulent, since to permit him to do so would be to give him an inequitable advantage over other bidders at the sale who, but for the condition announced, might have bid more for the property.⁷

§ 22. **Subsequent purchasers.**—In general.—A subsequent *bona fide* purchaser of real property, under the statute of 27 Elizabeth, may avoid a prior voluntary conveyance or transfer of the same property by his grantor, upon proof that the prior

thereof to himself from defendant in exchange for promissory notes, the fact that the notes have been received by plaintiffs from defendant in the due course of business does not estop them from challenging the transfer of the property to the interpleader as fraudulent as to creditors. *Martin v. Johnson*, 23 Mo. App. 96.

Ohio.—*Crumbaugh v. Kugler*, 3 Ohio St. 544.

Pa.—*Furness v. Ewing*, 2 Pa. St. 479.

Tenn.—*Cunningham v. Campbell*, 3 Tenn. Ch. 708. But see *Nichol v. Nichol*, 63 Tenn. 145, where the acceptance of a note was held not such a receipt of a benefit under the fraudulent conveyance as precluded the creditor from afterward attacking it.

Vt.—*Ingals v. Brooks*, 29 Vt. 398.

Can.—*Rielle v. Reid*, 26 Ont. App.

54; *Wood v. Reesor*, 22 Ont. App. 57; *Young v. Ward*, 24 Ont. App. 147.

Compare Wadsworth v. Marsh, 9 Conn. 481; *Goldnamer v. Robinson*, 11 Ky. L. Rep. 630.

6. Ky.—*White v. Cates*, 37 Ky. 357.

Mich.—*Marshall v. Blass*, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

N. J.—*DeGraw v. Mechan*, 48 N. J. Eq. 219, 21 Atl. 193.

N. C.—*Thigpen v. Pitt*, 54 N. C. 49.

Contra.—*Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784, the right of an execution creditor, purchasing at his own sale, to set aside his debtor's prior conveyance, is not affected by the fact that he purchased the lands for a trifle on account of the existence of such conveyance.

7. Friedrich v. Brewster, 26 Hun (N. Y.), 236.

conveyance was made with fraudulent intent.⁸ The same rule prevails in most of the United States where the statute of 27 Elizabeth has been adopted or substantially re-enacted, and a subsequent purchaser for a good consideration may set aside a prior fraudulent conveyance made by his grantor.⁹ The statute

8. Eng.—*De Mestre v. West*, A. C. 264, 55 J. P. 613, 60 L. J. P. C. 66, 64 L. T. Rep. N. S. 375; *In re Cameron*, 37 Ch. Div. 32, 57 L. J. Ch. 69, 57 L. T. Rep. N. S. 645, 36 Wkly. Rep. 5; *Shurmur v. Sedgwick*, 24 Ch. Div. 597, 53 L. J. Ch. 87, 49 L. T. Rep. N. S. 156, 31 Wkly. Rep. 884; *Cracknall v. Jansen*, 11 Ch. Div. 1, 48 L. J. Ch. 168, 40 L. T. Rep. N. S. 640, 27 Wkly. Rep. 851; *Doe v. Rolfe*, 8 A. & E. 650, 7 L. J. Q. B. 251, 3 N. & P. 648, 35 E. C. L. 775; *Doe v. Roe*, 5 B. & Ad. 1 Arn. 279, 4 Bing. N. Cas. 737, 6 Scott, 525, 33 E. C. L. 950; and other earlier cases.

Can.—*Harper v. Culbert*, 5 Ont. 152; *Buchanan v. Campbell*, 14 Grant Ch. (U. C.) 163; *Osborne v. Osborne*, 5 Grant Ch. (U. C.) 619; *Demorest v. Miller*, 42 U. C. Q. B. 56; *Miller v. McGill*, 24 U. C. Q. B. 597; *Wilson v. Wilson*, 8 U. C. C. P. 525.

A voluntary gift for charitable purposes is not to be treated as covinous within the meaning of 27 Eliz., chap. 4, and is not avoided by a subsequent conveyance for value. *Ramsay v. Gilchrist*, A. C. 412, 56 J. P. 711, 61 L. J. P. C. 72, 66 L. T. Rep. N. S. 806.

A purchaser from an heir is not entitled under 27 Eliz., chap. 4, to set aside a voluntary conveyance by the ancestor. *Lewis v. Rees*, 3 Jur. N. S. 12, 3 Kay & J. 132, 26 L. J. Ch. 101, 5 Wkly. Rep. 96.

9. N. Y.—*Wadsworth v. Havens*, 3 Wend. 411.

U. S.—*Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120. And see *Greenbank v. Ferguson*, 58 Fed. 18.

Ala.—*Stokes v. Jones*, 18 Ala. 734; *McGuire v. Miller*, 15 Ala. 294; *Elliot v. Horn*, 10 Ala. 348, 44 Am. Dec. 488. And see *Walton v. Bonham*, 24 Ala. 513.

Cal.—*Kohner v. Ashenaur*, 17 Cal. 578.

Ga.—*Brown v. Burke*, 22 Ga. 574; *Fowler v. Waldrup*, 10 Ga. 350; *Lee v. Brown*, 7 Ga. 275.

Iowa.—*Wolf v. Van Metre*, 23 Iowa, 397; *Gardner v. Cole*, 21 Iowa, 205.

Ky.—*Edwards v. Ballard*, 14 B. Mon. 289; *Dalton v. Mitchell*, 4 J. J. March, 372.

La.—*Ray v. Harris*, 7 La. Ann. 138.

Mass.—*Hill v. Ahern*, 135 Mass. 158; *Blanchard v. McKey*, 125 Mass. 124; *Freeland v. Freeland*, 102 Mass. 475; *Cox v. Jackson*, 88 Mass. 108.

Mo.—*Chapman v. Callahan*, 66 Mo. 299; *Henderson v. Dickey*, 50 Mo. 161.

N. H.—*Marston v. Brackett*, 9 N. H. 336.

N. C.—*Lata v. Morrison*, 23 N. C. 149.

R. I.—*Tiernay v. Claffin*, 15 R. I. 220, 2 Atl. 762.

S. C.—*Sutton v. Pettus*, 4 Rich. 163.

Tenn.—*Laird v. Scott*, 5 Heisk. 314.

Vt.—*Hoy v. Wright*, Brayt. 208.

Wis.—*Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

Fraudulent grantor estopped.—One who has made a voluntary conveyance of his property to defraud

of 27 Elizabeth has in many of the states been extended by statute so as to include the conveyance of personal property, as well as real property.¹⁰ The statute, in some jurisdictions, provides that a fraudulent conveyance can only be attacked as fraudulent by subsequent purchasers when made with intent to defraud such purchasers, and hence subsequent purchasers cannot defeat a prior conveyance on the ground that it was made with intent to defraud creditors.¹¹

§ 23. **Who are subsequent purchasers.**—No one can be considered as a subsequent purchaser under the statute respecting fraudulent conveyances unless he has acquired the legal title by a valid deed of conveyance. A covenant to convey does not constitute him a purchaser, authorized to contest the validity of a deed on the ground of fraud.¹² A judgment creditor is not a

his creditors, and subsequently conveys the same to a purchaser in good faith and for a valuable consideration, is estopped from denying the latter conveyance. *Hurley v. Ostler*, 44 Iowa, 642.

10. *N. Y.*—*Clute v. Fitch*, 25 Barb. 428, fraud in the sale of a chattel valid as between the parties may be alleged by subsequent purchasers from the seller.

Ala.—*Corprew v. Arthur*, 15 Ala. 525; *Eddins v. Wilson*, 1 Ala. 237.

Colo.—*McKee v. Bassick Min. Co.*, 8 Colo. 392, 8 Pac. 561.

Iowa.—*Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746.

Mont.—*Stevens v. Curran*, 28 Mont. 366, 72 Pac. 753.

N. C.—*Potts v. Blackwell*, 56 N. C. 449; *Freeman v. Lewis*, 27 N. C. 91, a trustee or mortgagee for a valuable consideration is to be considered a purchaser within provisions of 27 Elizabeth.

S. C.—*Hudnal v. Wilder*, 4 McCord,

294, 17 Am. Dec. 744.

Tex.—*Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490.

11. *N. Y.*—*Zimmerman v. Schoenfeldt*, 3 Hun, 692, 6 Thomps. & C. 142.

Miss.—*Prestidge v. Cooper*, 54 Miss. 74.

Mo.—*Davidson v. Dockery*, 179 Mo. 687, 78 S. W. 624; *Reynolds v. Faust*, 179 Mo. 21, 77 S. W. 855; *Evans v. David*, 98 Mo. 405, 11 S. W. 975, and the purchaser must have been a party or privy to the fraud; *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740.

N. H.—*Quimby v. Williams*, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685.

Tenn.—*Harton v. Lyons*, 97 Tenn. 180, 36 S. W. 851.

12. *Hopkins v. Webb*, 9 Humphr. (Tenn.) 519.

Lessee a purchaser for value.—Where a mining lease for 99 years contained provisions enabling the lessor to demand at his option a royalty upon the proceeds of the mines,

purchaser for value within the statute of 27 Elizabeth.¹³ A mortgagee for a valuable consideration is to be considered a subsequent purchaser, and is entitled to the same protection accorded to any *bona fide* purchaser, under the statute against fraudulent conveyances.¹⁴ A purchaser at execution sale is a subsequent purchaser who may attack a conveyance for fraud.¹⁵

§ 24. *Bona fide purchaser for value.*—A subsequent purchaser, seeking to attack a prior conveyance on the ground of fraud and to hold property as against a prior fraudulent vendee

or \$4,000 in lieu of such option, the lessee was a purchaser for value, and a prior voluntary conveyance was void as against him. *Conlin v. Elmer*, 16 Grant Ch. (U. C.) 541.

13. *Beavan v. Oxford*, 6 DeG. M. & G. 507, 2 Jur. N. S. 121, 25 L. J. Ch. 299, 41 Wkly. Rep. 275, 55 Eng. Ch. 395, 43 Eng. Reprint, 1331; *Gillespie v. Van Egmond*t, 6 Grant Ch. (U. C.) 533.

14. *Ill.*—*Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130.

Ind.—*Sanders v. Muegge*, 91 Ind. 214, but the mortgagee having had constructive notice that the conveyance to the mortgagor was made to defraud creditors, he was barred from attacking the same.

Iowa.—*Osborn v. Ratliff*, 53 Iowa, 748, 5 N. W. 746. The fact that a transfer of certificate of stock is fraudulent as to creditors will not invalidate a subsequent contract between the debtor and his attorney, who is not a party to the fraud, providing that the transferee shall hold the stock as security for whatever sum is or may become due to the attorney for services in the litigation with creditors. *Cox v. Collis*, 109 Iowa, 270, 80 N. W. 343.

Ky.—*Cook v. Landrum*, 26 Ky. L. Rep. 813, 82 S. W. 585.

Md.—*Stewart v. Iglehart*, 7 Gill & J. 132, 28 Am. Dec. 202, but the mortgagee cannot attack where he had notice of the previous conveyance.

Mich.—*Fox v. Clark*, Walk. Ch. 535.

N. H.—*Plaisted v. Holmes*, 58 N. H. 619.

N. J.—*Boice v. Conover*, 54 N. J. Eq. 531, 35 Atl. 402.

N. C.—*Potts v. Blackwell*, 56 N. C. 449; *Freeman v. Lewis*, 27 N. C. 91.

Va.—*Tate v. Liggat*, 2 Leigh. 84.

Can.—*Gordon v. Proctor*, 20 Ont. 53.

Eng.—*Dolphin v. Aylward*, L. R. 4 H. L. 486, 23 L. J. Rep. N. S. 636, 19 Wkly. Rep. 49; *Cracknall v. Janson*, 11 Ch. D. 1, 48 L. J. Ch. 168, 40 L. T. Rep. N. S. 640, 27 Wkly. Rep. 851; *Townshend v. Windham*, 2 Ves. 1, 28 Eng. Reprint, 1. See *Herrick v. Attwood*, 2 DeG. & J. 21, 4 Jur. N. S. 101, 27 L. J. Ch. 121, 6 Wkly. Rep. 204, 59 Eng. Ch. 17, 44 Eng. Reprint, 895.

15. *Carter v. Castleberry*, 5 Ala. 277; *Rinehardt v. Long*, 95 Mo. 396, 8 S. W. 559; *Gray v. Tappan*, Wright (Ohio), 117. See *Gentry v. Robinson*, 55 Mo. 260.

of his vendor, must himself be a purchaser in good faith and for a valuable consideration, since a prior fraudulent conveyance is valid as against a volunteer who has taken a conveyance to defraud creditors or a subsequent fraudulent purchaser, as well as against the party making it.¹⁶ The protection accorded to a *bona fide* purchaser for value will not be given to a purchaser for a grossly inadequate consideration. He must have paid a fair consideration, although not necessarily the full value.¹⁷

§ 25. **Effect of notice.**—The English courts maintain the rule that under the statute of 27 Elizabeth all voluntary conveyances and conveyances by way of settlement made in consideration of love and affection merely, or a sense of moral duty, are *ipso facto* fraudulent and void as against subsequent purchasers for value with or without notice of the prior voluntary conveyance.¹⁸

16. N. Y.—Starr v. Strong, 2 Sandf. Ch. 139.

Ala.—Dent v. Portwood, 21 Ala. 588; Eddins v. Wilson, 1 Ala. 237.

Ill.—Campbell v. Whitson, 68 Ill. 240, 18 Am. Dec. 553.

Ind.—Anderson v. Etter, 102 Ind. 115, 26 N. E. 218; Way v. Lyon, 3 Blackf. 76.

Ky.—Edwards v. Ballard, 53 Ky. 289.

Mass.—Cox v. Jackson, 6 Allen, 108; Clapp v. Tirrell, 37 Mass. 247.

Miss.—Montgomery v. McGuire, 59 Miss. 193.

N. J.—DeWitt v. Van Sickle, 29 N. J. Eq. 209.

N. C.—McKay v. Gilliam, 65 N. C. 130; Hiatt v. Wade, 30 N. C. 340; Fullenwider v. Robertson, 20 N. C. 420.

Ohio.—Varwig v. Cleveland, etc., R. Co., 54 Ohio St. 455, 44 N. E. 92.

Tex.—Lewis v. Castleman, 27 Tex. 407; McClenny v. Ford, 10 Tex. 159.

Vt.—Prout v. Vaughan, 52 Vt. 451.

Va.—Roane's Adm'r v. Vidal, 4 Munf. 187.

Can.—Weller v. Hartgraves, 14 U. C. C. P. 360.

Eng.—Dolphin v. Aylward, L. R. 4, H. L. 486, 23 L. T. Rep. N. S. 636, 19 Wkly. Rep. 49; Doe v. Routledge, 2 Cowp. 705; Lewis v. Rees, 3 Jur. N. S. 12, 3 Kay & J. 132, 26 L. J. Ch. 101, 5 Wkly. Rep. 96; Cadell v. Bewley, 16 L. T. Rep. N. S. 141, 15 Wkly. Rep. 703.

17. Worthy v. Caddell, 76 N. C. 82. But see Boyer v. Tucker, 70 Mo. 457, one who purchases at sheriff's sale land worth \$4,000 for \$23, for the purpose of speculation, is entitled, notwithstanding the smallness of consideration paid, to set aside as fraudulent a prior conveyance by the execution defendant, made for the purpose of defeating creditors.

18. Dolphin v. Aylward, L. R. 4 H. L. 486, 23 L. T. Rep. N. S. 636, 19 Wkly. Rep. 49; Doe v. Rusham, 17 Q. B. 723, 16 Jur. 359, 21 L. J. Q. B.

The Canadian courts follow the English rule in the construction of the statute.¹⁹ Some of the earlier cases in the United States followed the English rule.²⁰ The more generally prevailing rule in the United States, however, is that a subsequent purchaser of property with notice of a previous voluntary or fraudulent conveyance thereof by his grantor cannot impeach such prior conveyance as fraudulent and maintain an action to set it aside, although he has paid a valuable consideration.²¹ In some juris-

139, 79 E. C. L. 723; *Talton v. Liddell*, 17 Q. B. 390, 15 Jur. 1170, 20 L. J. Q. B. 507, 7 Eng. L. & Eq. 360, 79 E. C. L. 390; *Butterfield v. Heath*, 15 Beav. 408, 22 L. J. Ch. 270, 51 Eng. Reprint, 595; and other earlier cases.

Voluntary conveyances acts.—

The voluntary conveyances act of 1893 (56 and 57 Vict., chap. 21), provides that voluntary conveyances, if *bona fide*, are not to be avoided under 27 Eliz., chap. 4.

The voluntary conveyances act of 1868 (31 Vict., chap. 9) gives effect as against subsequent purchasers to voluntary conveyances executed in good faith, and to them only, and a voluntary conveyance to a wife for the purpose of protecting property from the creditors is not good as against a subsequent mortgage to a creditor. *Richardson v. Armitage*, 18 Grant Ch. (U. C.) 512.

19. *Demorest v. Miller*, 42 U. C. Q. B. 56.

20. N. Y.—*Roberts v. Anderson*, 3 Johns. Ch. 371; *Sterry v. Arden*, 1 Johns. Ch. 261.

U. S.—*Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603.

Ky.—*Waller v. Cralle*, 8 B. Mon. 11; *Anderson v. Green*, 7 J. J. Marsh, 448, 23 Am. Dec. 417.

Mass.—*Ricker v. Ham*, 14 Mass. 137.

Mo.—*Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126.

S. C.—*Barrineau v. McMurray*, 3 Brev. 204; *Rutledge v. Smith*, 1 McCord Eq. 119.

21. U. S.—*Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120, the universally received doctrine at the commencement of the American revolution as to the construction of the statute of 27 Elizabeth unquestionably went as far as to hold that a subsequent sale, without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was *bona fide*; and that this principle therefore according to the uniform course of this court must be adopted in construing the statute of 27 Elizabeth as it applies to the case.

Cal.—*Gregory v. Haworth*, 25 Cal. 653.

Colo.—*McKee v. Bassick Min. Co.*, 8 Colo. 392, 8 Pac. 561.

Ill.—*Chaffin v. Kimball*, 23 Ill. 36.

Ind.—*Aiken v. Bruen*, 21 Ind. 137; *Paine v. Doe*, 7 Blackf. 485; *McNeely v. Rucker*, 6 Blackf. 391.

Ky.—*Neighbors v. Holt*, 14 Ky. L. Rep. 237.

dictions it is held that a voluntary conveyance is good, as well against subsequent purchasers from the grantor with notice of the previous conveyance as against subsequent creditors, unless it be shown that it was intended to defraud creditors, and that the execution of a voluntary conveyance does not raise a presumption of fraud as against a subsequent purchaser from the grantor of the property voluntarily conveyed, when the purchaser had notice of the voluntary conveyance, nor does such a presumption arise from such sale against the voluntary conveyance.²² Constructive notice is held in some jurisdictions sufficient

Mich.—Dennis v. Dennis, 119 Mich. 380, 78 N. W. 333; Cooper v. Bigly, 13 Mich. 463.

Minn.—Olson v. Hanson, 74 Minn. 337, 77 N. W. 231; Fitzpatrick v. Hanson, 55 Minn. 195, 56 N. W. 814.

Miss.—Prestidge v. Cooper, 54 Miss. 74; Coppage v. Barnett, 34 Miss. 621; Farmers' Bank v. Douglass, 19 Miss. 469.

Mo.—Davis v. Kline, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; Bonney v. Taylor, 90 Mo. 63, 1 S. W. 740.

Neb.—Earle v. Burch, 21 Neb. 702, 33 N. W. 254, if a creditor receive his pay in mortgaged property with knowledge of the mortgage, he will take the property subject to the mortgage, and cannot contest its validity; Bradt v. Hartson, 4 Neb. (Unoff.) 889, 96 N. W. 1008.

N. H.—Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Stevens v. Morse, 47 N. H. 532; Marston v. Brackett, 9 N. H. 336.

N. J.—Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402.

N. C.—Pass v. Lynch, 117 N. C. 453, 23 S. E. 357; Triplett v. Wither-
spoon, 70 N. C. 589; Long v. Wright, 48 N. C. 290; Hiatt v. Wade, 30 N. C. 340; Squires v. Riggs, 4 N. C. 253, 6 Am. Dec. 564.

Ohio.—Mathews v. Rentz, 5 Ohio Dec. 72, 2 Am. L. Rec. 371.

Pa.—Thomson v. Dougherty, 12 Serg. R. 448; Foster v. Walton, 5 Watts 378.

S. C.—Moultrie v. Jennings, 2 McMull. 508; Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Kid v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702; Footman v. Pendergrass, 3 Rich. Eq. 33.

Tenn.—Hubbs v. Brockwell, 35 Tenn. 574. *Compare* Laird v. Scott, 5 Heisk. 314.

Tex.—Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Robinson v. Martell, 11 Tex. 149; McClenny v. Floyd, 10 Tex. 159.

22. *Ala.*—Gilliland v. Fenn, 90 Ala. 230, 8 So. 15, 9 L. R. A. 413; Gardner v. Boothe, 31 Ala. 186; Corprew v. Arthur, 15 Ala. 525; Griffin v. Doe, 12 Ala. 783; Elliott v. Horn, 10 Ala. 348, 44 Am. Dec. 488; Frisbie v. McCarty, 1 Stew. & P. 68.

Iowa.—Saunders v. King, 119 Iowa, 291, 93 N. W. 272; Wolf v. Van Metre, 23 Iowa, 397.

Ky.—Earle v. Couch, 3 Metc. 450; Enders v. Williams, 1 Metc. 346; Neighbors v. Holt, 14 Ky. L. Rep. 237; Winter v. Mannen, 4 Ky. L. Rep. 949.

Me.—Wyman v. Brown, 50 Me.

to bar a subsequent purchaser's right of action to set aside a fraudulent conveyance. For example, where previous sales and conveyances are matters of record, or the subsequent purchaser has knowledge of the facts and circumstances sufficient to put him on inquiry and he neglects to inquire, he will be chargeable with notice.²³ In other jurisdictions constructive notice is held insufficient and actual notice is held to be necessary to preclude the right of action of a subsequent purchaser.²⁴

139. But see *Spofford v. Weston*, 29 Me. 140.

Md.—*Cooke v. Kell*, 13 Md. 469; *City of Baltimore v. Williams*, 6 Md. 235.

23. *Ind.*—*McNeely v. Rucker*, 6 Blackf. 391, the record of a voluntary conveyance is sufficient notice to a subsequent purchaser.

Md.—*Milbolland v. Tiffany*, 64 Md. 455, 2 Atl. 831.

Mass.—*Beal v. Warren*, 2 Gray, 447.

Mo.—*Frank v. Caruthers*, 108 Mo. 569, 18 S. W. 927, where the sale and conveyance were matters of record of which the purchaser had full notice; *State v. Estel*, 6 Mo. App. 6, where the purchaser had sufficient knowledge to excite the suspicion of an ordinarily prudent man, but failed to make inquiry.

N. J.—*Dewitt v. Van Sickle*, 29 N. J. Eq. 209, purchaser chargeable with notice when he had such knowledge of facts and circumstances as would naturally prompt a prudent mind to further inquiry and examination.

N. C.—*Harris v. DeGraffenreid*, 33 N. C. 89.

Pa.—*Tate v. Clement*, 176 Pa. St. 550, 35 Atl. 214, where a recital in the purchaser's deed referred to the prior deed.

S. C.—*C. Aultman & Co. v. Utsey*, 34 S. C. 559, 13 S. E. 848, where purchasers had sufficient notice to put them on inquiry.

Tenn.—*Harton v. Lyons*, 97 Tenn. 180, 36 S. W. 851, where the voluntary deed was registered prior to the subsequent purchase; *Laird v. Scott*, 5 Heisk. 314.

24. *Iowa.*—*Garner v. Cole*, 21 Iowa, 205, the constructive notice arising from the record of a deed is insufficient.

Ky.—*Enders v. Williams*, 1 Metc. 346; *Jones v. Jenkins*, 7 Ky. L. Rep. 408; *Winter v. Mannen*, 4 Ky. L. Rep. 949.

Me.—*Spofford v. Weston*, 29 Me. 140.

Tex.—*Lewis v. Castleman*, 27 Tex. 407, record of deed not notice to subsequent purchaser.

CHAPTER VI.

BADGES OF FRAUD.

- Section 1. Badges of fraud in general.
2. Recital of false consideration.
 3. Consideration fictitious in whole or part.
 4. Consideration inadequate.
 5. Excessive security.
 6. Excess in amount secured.
 7. Transfers in anticipation of or pending legal proceedings.
 8. Transfers of all the debtor's property.
 9. Excessive effort to give appearance of fairness.
 10. Suspicious circumstances unexplained.
 11. Transfer without change of possession.
 12. Reservation of trust or benefit for grantor.
 13. Relationship of parties.
 14. Indebtedness or insolvency of debtor.
 15. Absolute transfer intended as security.
 16. Concealment of or failure to record or file instrument.
 17. Secrecy and haste.
 18. Sales on credit.
 19. Transactions not in usual course of business.
 20. Other circumstances indicating fraud.
 21. Repelling badges of fraud.

Section 1. *Badges of fraud in general*.—Various facts and circumstances are often referred to as and denominated badges or *indicia* of fraud, because they usually or frequently attend conveyances or transfers intended to hinder, delay and defraud creditors, and are frequently or usually found in cases where fraud exists, and are relied upon to establish the existence of fraud.¹ Badges of fraud have been said to be facts calculated to throw

1. *Thompson v. Williams*, 100 Md. 195, 199, 60 Atl. 26; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131, wherein quite a number of the usual badges of fraud were found grouped together and left unexplained. These were gross inadequacy of price; no security taken for the purchase money; an unusual length of credit for the

deferred installments; bonds taken payable at long periods, when the pretence was that the deferred installments evidenced by them had already been satisfied in the main by antecedent debts due by the obligee to the obligor; the conveyance made in payment of alleged indebtedness of father to son, residing together as members

suspicion on a transaction, and which call for an explanation.² It has been said that they are inferences drawn by experience from the customary conduct of mankind,³ and that they afford grounds

of one family; the indebtedness and insolvency of the grantor, and well known to the grantee; the threats and pendency of suits; the secrecy and concealment of the transaction; keeping the deed unacknowledged and unrecorded for over a year; grantor remaining in possession as before the conveyance, and cautioning the kinsman justice, who took the acknowledgment, to keep the matter private; and the relation between grantor and grantee.

Glenn v. Glenn, 17 Iowa, 498, wherein some of the badges of a fraudulent sale were that the vendor was in embarrassed circumstances; that the sale was made on the day that a suit was commenced against him; that the subject of the sale comprised the whole of his property; that the vendees were his sons and some other relatives, all of whom were pecuniarily irresponsible and one was a minor; that but little, if any, of the property had been assessed for taxes against the vendees; that the sale was almost wholly on credit, and that no security was taken; that the property was afterward controlled by and for the benefit of the father; and that none of the parties were offered as witnesses to rebut the suspicious circumstances.

Herrin v. Morford, 39 Ky. (9 Dana) 450, wherein a conveyance made by a debtor was set aside at the suit of a creditor, where it appeared that it transferred all the property of the debtor of value; that the transaction was secret, and was made pending a suit of the creditor; that

the pretended sale was for a much less price than was paid for the property when bought a few months previous, though it was advancing in value; that it was so made as to concentrate the property in the debtor's two sons-in-law, who had no use for the property and never applied it to their personal use; and that the debtor remained in possession of and continued to enjoy his property. See also *White v. Gibson*, 113 Mo. App. 568, 88 S. W. 120; *St. Louis Brewing Assoc. v. Steimke*, 68 Mo. App. 52; *Weaver v. Owens*, 16 Oreg. 304, 18 Pac. 379, where the circumstances of the sale were held to constitute a badge of fraud, rendering the transaction fraudulent as to the grantor's creditors.

In the famous *Twyne's Case*, 3 Rep. 80, 3 Coke, 80a, 1 Smith's Lead. Cas. 1, the following badges or marks of fraud were pointed out by the court: (1) The gift was general, without exception of the donor's apparel, or of any thing of necessity; (2) the donor continued in possession, and used the goods as his own, and by means thereof traded with others and defrauded them; (3) it was made in secret; (4) it was made pending the writ; (5) there was a trust between the parties; (6) the deed expressed that the gift was made honestly, truly and *bona fide*.

2. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; *Peebles v. Horton*, 64 N. C. 374.

3. *Terrell v. Green*, 11 Ala. 207, 213.

of inference from which the jury are authorized to conclude that a transaction surrounded by them is fraudulent.⁴ More simply stated, they are the signs or marks of fraud.⁵ They do not of themselves or *per se* constitute fraud, but they are facts having a tendency to show the existence of fraud,⁶ although their value as evidence is relative and not absolute.⁷ They are not usually conclusive proof, but are open to explanation.⁸ They may be almost conclusive, or merely furnish a reasonable inference of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case.⁹ Even a single one of them may be sufficient to stamp a transaction as fraudulent,¹⁰ but when several are found in the same transaction, strong and clear evidence will be required to repel the conclusion of fraudulent intent.¹¹ The possible *indicia* of fraud have been said to be as infinite in number and form as are the resources and versatility of human artifice,¹² and it would be an almost impossible task to anticipate and catalogue them. We, therefore, have cited in the notes below many cases wherein the circumstances attending the transaction in question were held to be badges of fraud and others wherein the circumstances were held not to be badges of fraud.¹³

4. *Sherman v. Hogland*, 73 Ind. 472.

5. *Pilling v. Otis*, 13 Wis. 495.

6. *Shealy v. Edwards*, 75 Ala. 411; *Thames v. Rembert*, 63 Ala. 561; *Wilson v. Lott*, 5 Fla. 305.

7. *Thompson v. Williams*, 100 Md. 195, 199, 60 Atl. 26, "these *indicia* are open to explanation, and they are, therefore, not necessarily conclusive, as is an irrebuttable legal presumption. In many instances they furnish strong and satisfactory evidence of the existence of fraud; but as they are relative and not absolute as respects their probative value, the special circumstances accompanying each inquiry must be known and considered in order that the weight prop-

erly attributable to those *indicia* may be given to them.

8. *Marshall v. Croon*, 52 Ala. 554; *Hodges v. Coleman*, 76 Ala. 103.

9. *Pilling v. Otis*, 13 Wis. 495.

10. *Stoddard v. Butler*, 20 Wend. (N. Y.) 507, a transfer of property to a creditor, toward the satisfaction of his claim merely and not in full payment, is a badge of fraud.

11. *Hickman v. Trout*, 83 Va. 491; *Shealy v. Edwards*, 15 Ala. 411; *Williams v. Barnett*, 52 Tex. 130.

12. *Shealy v. Edwards*, 75 Ala. 411.

13. **Circumstances held to be badges of fraud.**—N. Y.—*St. John Wood-Working Co. v. Smith*, 178 N. Y. 629, 71 N. E. 1139, *aff'd* 82 App. Div. 348, 82 N. Y. Supp. 1025; *Third*

§ 2. **Recital of false consideration.**—The recital of a false consideration in a deed of trust, mortgage, or other conveyance of

Nat. Bank v. Keffe, 30 Misc. Rep. 400, 63 N. Y. Supp. 1049; Stoddard v. Butler, 20 Wend. 507, transfer of property to a creditor towards the satisfaction of his claim merely, and not in full payment, is a badge of fraud.

Ga.—Trice v. Rose, 79 Ga. 75, 3 S. E. 701; Howard v. Snelling, 32 Ga. 195.

Ill.—Merchants' Nat. Bank v. Lyon, 185 Ill. 343, 56 N. E. 1083; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70; Carter v. Gunnels, 67 Ill. 270; Blow v. Gage, 44 Ill. 208; Gray v. St. John, 35 Ill. 222; Boies v. Henney, 32 Ill. 130.

Iowa.—Dunning v. Baily, 120 Iowa, 729, 95 N. W. 248; Corn Exch. Bank v. Applegate, 91 Iowa, 411, 59 N. W. 268.

Ky.—Lillard v. McGee, 4 Bibb, 165, selling at auction without previous notice or advertisement.

Me.—Hartshorn v. Eames, 31 Me. 93.

Mass.—Parker v. Barker, 43 Mass. 423, a promise by the mortgagee to the mortgagor's creditors that he will relinquish his claim if they will accept another mortgage and give the mortgagor time is presumptive evidence of fraud.

Minn.—Welch v. Bradley, 45 Minn. 540, 48 N. W. 440.

N. J.—Moore v. Roe, 35 N. J. Eq. 90.

N. C.—Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748.

Pa.—Waterhouse v. Waterhouse, 206 Pa. St. 433, 55 Atl. 1067; Kaine v. Weigley, 22 Pa. St. 179.

Tenn.—Carter v. Baker, 57 Tenn. 640.

Va.—American Net, etc., Co. v. Mayo, 97 Va. 182, 97 S. E. 523; Click v. Green, 77 Va. 827; Hickman v. Trout, 83 Va. 491.

W. Va.—Richardson v. Ralphsnyder, 40 W. Va. 15, 20 S. E. 854; Goshorn v. Snodgrass, 17 W. Va. 717; Hunter v. Hunter, 10 W. Va. 321; Lockhard v. Beckley, 10 W. Va. 87.

Circumstances held not to be badges of fraud.—*N. Y.*—Craig v. Tappin, 2 Sandf. Ch. 78, taking a mortgage after the creditor knew of the intention of the debtor to mortgage the same land to another creditor to secure a pre-existing debt.

U. S.—Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157, the mere fact that a non-resident, who purchases lands from his brother, subsequently gives the latter a power of attorney to dispose of all his lands in the State, raises no presumption that the purchase was for the purpose of defrauding the brother's creditors, it appearing that the donor had other lands in the State; Ryttenberg v. Shaefer, 131 Fed. 313, a contract by which a bankrupt commission firm, some years before its bankruptcy, agreed to do all its business through another firm, obtaining the benefit of the latter's credit, held not invalid, as a scheme to hinder, delay or defraud its creditors; Jenkins v. Einstein, Fed. Cas. No. 7,265, 3 Biss. 128, the fact that an attorney who thinks he knows the title, having confidence in the vendor, purchases without an abstract or examination of title of real property, is not proof of

property, or the misrepresentation of the liability or obligation secured by it, is a badge or evidence of fraud.¹⁴ It is undoubtedly

fraud, in a suit to set aside the conveyance as made to hinder creditors; *Bank of the United States v. Lee*, Fed. Cas. No. 922 (5 Cranch, C. C. 319), *aff'd* 38 U. S., 13 Pet. 107, 10 L. Ed. 81, failure of a first incumbrancer to give notice after a second incumbrancer has advanced his money is no evidence of fraud.

Ala.—*Chipman v. Stern*, 89 Ala. 207, 7 So. 409; *Sandlin v. Anderson*, 82 Ala. 330, 3 So. 28.

Ark.—*Blass v. Anderson*, 57 Ark. 483, 22 S. W. 94, the fact that a sale is illegal because against the prohibition of a statute, as because it was made on Sunday, does not establish that it is fraudulent as to creditors.

Ga.—*Phimzy v. Clark*, 62 Ga. 623; *Colquitt v. Thomas*, 8 Ga. 258.

Ill.—*Freishenmeyer v. Lehmkuhl*, 29 Ill. App. 465.

Ind.—*Kane v. Drake*, 27 Ind. 29.

Md.—*Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Bullett v. Worthington*, 3 Md. Ch. 99.

Mich.—*Bendetson v. Moody*, 100 Mich. 553, 59 N. W. 252.

Minn.—*Derby v. Gallup*, 5 Minn. 119.

Miss.—*Donly v. Ray* (1889), 6 So. 324.

N. J.—*Emerald, etc., Brewing Co. v. Sutton*, 68 N. J. L. 246, 50 Atl. 302, refusal of a debtor to apply the proceeds of his property to a particular creditor.

N. C.—*Cannon v. Young*, 89 N. C. 264, conversion by an insolvent debtor of his land into money or property not subject to execution.

Pa.—*Barncord v. Kuhn*, 36 Pa. St. 383, the husband's possession of his

wife's property is not a badge of fraud; *Forsyth v. Matthews*, 14 Pa. St. 100, 53 Am. Dec. 522; *Strong v. Burdick*, 1 Pennyp. 498.

S. C.—*Leake v. Anderson*, 43 S. C. 448, 21 S. E. 439.

Tex.—*Mack v. Block* (1888), 8 S. W. 495; *Eason v. Garrison*, 36 Tex. Civ. App. 574, 82 S. W. 800.

Vt.—*Wallace v. Berry*, 51 Vt. 602. *Va.*—*Harvey v. Anderson* (1896), 24 S. E. 914.

Wash.—*Commercial Bank v. Chilberg*, 14 Wash. 47, 44 Pac. 112.

Wis.—*Fortner v. Whelan*, 87 Wis. 88, 58 N. W. 253; *Peninsula Stove Co. v. Sacket*, 74 Wis. 526, 43 N. W. 491.

14. *N. Y.*—*McKinster v. Babcock*, 26 N. Y. 378; *Griffin v. Cranstor*, 1 Bosw. (N. Y.) 281; *Lawrence Bros. v. Heylman*, 98 N. Y. Supp. 121.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289; *Stinson v. Hawkins*, 16 Fed. 850, 5 McCrary, 284.

Ala.—*Harris v. Russell*, 93 Ala. 59, 9 So. 541, enlarging the debt by adding usury; *Pickett v. Pipkin*, 64 Ala. 520; *Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86.

Ark.—*Henry v. Harrell*, 57 Ark. 569, 22 S. W. 433.

Conn.—*North v. Belden*, 13 Conn. 376, 35 Am. Dec. 83.

Ill.—*Adams v. Pease*, 113 Ill. App. 356.

Ind.—*Goff v. Rogers*, 71 Ind. 459.

Iowa.—*Bussard v. Bullitt*, 95 Iowa, 736, 64 N. W. 658; *Lombard v. Dows*, 66 Iowa, 243, 23 N. W. 649; *Taylor v. Wendling*, 66 Iowa, 562, 24 N. W. 40.

always advisable to state, fairly and plainly, the true consideration, and when this is not done, the instrument may be open to suspicion, and the question may be fairly raised whether, in stating an untrue, instead of the true, consideration, there was not a design to mislead and deceive the creditors of the grantor or mortgagor, or judgment debtor, and to hinder, delay, or defraud them.¹⁵ But the mere fact that the consideration expressed in a conveyance of any kind was not the true one does not conclusively show that the conveyance was in fraud of creditors.¹⁶ The conveyance may

Ky.—Enders v. Swayne, 38 Ky. (8 Dana) 103.

Mass.—Lynde v. McGregor, 13 Allen (Mass.), 372.

Mich.—Patrick v. Riggs, 105 Mich. 616, 63 N. W. 532; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 165; Showman v. Lee, 86 Mich. 556, 49 N. W. 578; King v. Hubbell, 42 Mich. 497, 4 N. W. 440; Williams v. Desenberg, 41 Mich. 156, 2 N. W. 201.

Minn.—Hanson v. Bean, 51 Minn. 546, 38 Am. St. Rep. 516, 53 N. W. 871.

Mo.—Glasgow Milling Co. v. Burns, 144 Mo. 192, 45 S. W. 1074; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82.

Neb.—Ellis v. Musselman, 61 Neb. 262, 85 N. W. 75.

N. H.—Kennard v. Gray, 58 N. H. 51.

N. J.—Newman v. Kirk, 45 N. J. Eq. 677, 8 Atl. 224; Heintze v. Bentley, 34 N. J. Eq. 562.

N. C.—Perry v. Hardison, 99 N. C. 21, 5 S. E. 230; Peebles v. Horton, 64 N. C. 374; Foster v. Woodfin, 33 N. C. 339.

Pa.—Gordon v. Preston, 1 Watts, 385, 26 Am. Dec. 75.

S. C.—Hipp v. Sawyer, Rich. Eq. Cas. 410.

Tenn.—Thurman v. Jenkins, 61 Tenn. (2 Baxt.) 426.

W. Va.—Bartlett v. Cleavenger, 35 W. Va. 718, 14 S. E. 273.

Wis.—Rice v. Morner, 64 Wis. 599, 25 N. W. 668; Blakeslee v. Rossman, 43 Wis. 1161; Butts v. Peacock, 23 Wis. 359. See Fraudulent intent and knowledge, Recital of false consideration, *post*.

15. McKinster v. Babcock, 26 N. Y. 378.

16. N. Y.—McKinster v. Babcock, 26 N. Y. 378.

Ala.—Cottingham v. Greely-Barnham Grocery Co., 137 Ala. 149, 34 So. 956; Troy Fertilizer Co. v. Norman, 107 Ala. 667, 18 So. 201; Pique v. Arendale, 71 Ala. 91; McCain v. Wood, 4 Ala. 258, where a deed of trust expressed a legal consideration, it is not void *per se*, because the amount of debts, etc., assigned by it is not set out, or the names of the debtors specified.

Colo.—Jefferson County Bank v. Hummel, 11 Colo. App. 337, 53 Pac. 286.

Conn.—Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315.

Ill.—Wooley v. Fry, 30 Ill. 158.

Ind.—Adams v. Laugel, 144 Ind. 608, 42 N. E. 1017; Goff v. Rogers, 71 Ind. 459.

have been executed in good faith, and for a valuable consideration, without any intent to defraud creditors, and, if this be shown, it will be held to be valid, notwithstanding the misrepresentation of the consideration or of the obligation or liability in fact secured and intended to be secured by it. The real consideration may be shown to repel an attack by creditors.¹⁷ It must appear that the misrepresentation was so made intentionally, and not by mere mistake, in computation or otherwise.¹⁸ There must be a fraudulent intent on the part of the purchaser or mortgagee, as well as on the part of the vendor or mortgagor.¹⁹ Courts will not strive to force conclusions of fraud. If the circumstances relied on to sustain the allegation of fraud are fairly susceptible of an honest intent, that construction will be placed upon them.²⁰ But a mortgage or deed of trust executed to hinder or delay the mortgagor's or grantor's creditors, and which purposely exaggerates the mortgagee's demand or the debts secured by the deed of trust, and the object of which is known to the mortgagee or the grantee at the time of its execution, is void as against such cred-

Iowa.—Mason v. Franklin, 58 Iowa, 506, 12 N. W. 554; Wood v. Scott, 55 Iowa, 114, 7 N. W. 465; Culbertson v. Luckey, 13 Iowa, 12.

Kan.—Rexroad v. Johnson, 6 Kan. App. 607, 49 Pac. 699; Bowling v. Armourdale Bank, 57 Kan. 174, 45 Pac. 584; Bush v. Bush, 33 Kan. 556, 6 Pac. 794.

Ky.—Highland v. Anderson's Adm'r, 13 Ky. Law Rep. 710, 17 S. W. 806.

La.—Brown v. Brown, 30 La. Ann. 966.

Mich.—Louden v. Vinton, 108 Mich. 313, 66 N. W. 222.

Minn.—Heim v. Chapel, 62 Minn. 338, 64 N. W. 825; Berry v. O'Connor, 33 Minn. 29, 21 N. W. 840; Manor v. Sheehan, 30 Minn. 419, 15 N. W. 687.

Mo.—Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Schroeder v. Bobbitt,

108 Mo. 289, 18 S. W. 1093; Finke v. Pike, 50 Mo. App. 564.

N. H.—Whittredge v. Edmunds, 63 N. H. 248.

Vt.—Brackett v. Wait, 6 Vt. 411.

Va.—Norris v. Lake, 89 Va. 513, 16 S. E. 663; Keagy v. Trout, 85 Va. 390, 7 S. E. 329.

Wis.—Barkow v. Sanger, 47 Wis. 500, 3 N. W. 16.

17. McKinster v. Babcock, 26 N. Y. 378; Manor v. Sheehan, 30 Minn. 419, 15 N. W. 687.

18. Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296.

19. Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353; Carpenter v. Muren, 42 Barb. (N. Y.) 300; Kevan v. Crawford, 46 L. J. Ch. 729, 6 Ch. D. 29, 37 L. T. Rep. N. S. 322, 26 Wkly. Rep. 49.

20. Alabama L. Ins. & T. Co. v. Pettway, 24 Ala. 544.

itors.²¹ And the recital of a false consideration in an absolute conveyance intended as a mortgage to secure a much smaller sum than that recited is strong evidence of participation in the grantor's fraudulent intent.²²

§ 3. **Consideration fictitious in whole or in part.**—Almost invariably some honest consideration is made the agency for floating a scheme of fraud against creditors. Where the balance of the consideration for a transfer of property, however, is made up of a false and pretended debt or claim, which is wholly fictitious and never, in fact, existed, and which both parties to the transaction falsely concocted to make up a full and fair consideration for the conveyance, the courts almost invariably hold that such a conveyance is wholly void and cannot stand to any extent as security or indemnity.²³ That a part of the alleged indebtedness

21. *Stinson v. Hawkins*, 16 Fed. 850, 5 McCrary, 284, 13 Fed. 833, 4 McCrary, 500; *Alabama L. Ins. & T. Co. v. Pettway*, 24 Ala. 544; *Wallis v. Adoue*, 76 Tex. 118, 13 S. W. 63; *Taylor v. Wood* (N. J. Ch.), 5 Atl. 818.

22. *Bailey v. Cheatham*, 4 Ky. Law Rep. 351.

23. *N. Y.*—*Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928.

U. S.—*Kellogg v. Clyne*, 54 Fed. 696, 4 C. C. A. 554, the acceptance by a creditor of a mortgage from his debtor for a greater amount than the sum actually due renders the mortgage presumptively fraudulent, and it cannot be upheld as a valid security for the sum actually due.

Mo.—*Gregory v. Sitlington*, 54 Mo. App. 60; *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524; *National Tube Works v. Ring Refrigerating, etc., Co.*, 118 Mo. 365, 22 S. W. 947, where part of the indebtedness secured by the mortgage of a corporation was the individual indebtedness of one of its

officers; *Hayden v. Alkire Grocery Co.*, 88 Mo. App. 241, including fictitious claims in a conveyance to secure a valid debt avoids the whole security; but while a claim is honest in itself, and the parties probably consider such debt might be properly so secured, it must be shown that such debt was included with a fraudulent purpose, and instructions should submit the existence of such purpose to the jury; *Seeger v. Thomas*, 107 Mo. 635, 18 S. W. 33, where the consideration included an obligation upon which the transferee was liable only as security, and which he had neither paid or assumed and would not be called upon to pay because it was amply secured by the insolvent; *Bowman v. Victor Min. Co.*, 78 Mo. App. 676, 2 Mo. A. Repr., where part of the consideration was to be subsequently advanced and the residue was to cover a note then due to the mortgagee, which was to be cancelled, and no part of the agreement was carried out; *Webb City Lumber Co.*

for which a chattel mortgage is given by an insolvent debtor is fraudulent as against his creditors will taint the entire transaction and avoid the whole mortgage as to creditors.²⁴ It has been said that no device can be more deceptive, and more likely to baffle, delay, or defeat creditors, than the creating of incumbrances upon their property by embarrassed men, for debts that are fictitious or mainly so.²⁵

§ 4. **Consideration inadequate.**—Inadequacy of consideration is generally held to be a badge or evidence of fraud, a fact to be considered in determining the good faith of the parties to the transaction.²⁶ Great inadequacy of price is a strong, though not

v. Victor Min. Co., Id.; Ball v. O'Neal, 64 Mo. App. 388, 2 Mo. App. Rep. 100, a chattel mortgage given to secure three notes, two of which were fraudulent; State v. Hope, 102 Mo. 410, 14 S. W. 985.

N. C.—Hawkins v. Alston, 39 N. C. 137.

Tex.—Watts v. Dubois (Tex. Civ. App.), 66 S. W. 698, but a mortgage in good faith on firm property to secure a firm debt and an individual partner's debt is valid, though the firm was insolvent when the mortgage was given, and known to be insolvent by the mortgagee.

Wis.—Liver v. Thielke, 115 Wis. 389, 91 N. W. 975, where a husband fraudulently conveys land to his wife, and she executes a mortgage thereon to her father, based on unauthorized payments by him of insurance money due by the husband, such mortgage being largely in excess of the real indebtedness of the husband to the father, is presumptively fraudulent; Butts v. Peacock, 23 Wis. 359.

Contra.—Can.—Campbell v. Paterson, 21 Can. S. C. 645, a mortgage fraudulent in part and partly for a *bona fide* advancement is not wholly

void, but may be upheld to the extent of the *bona fide* consideration.

The transaction is not a simulated one, when an actual consideration, however inadequate, has been paid by the purchaser in an alleged sale. Brown v. Brown, 30 La. Ann. 966.

24. Roland v. Ross, 120 Mo. 208, 25 S. W. 524. But see Rider v. Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314, holding that the fraudulency of the debts secured to some of the creditors by a deed of trust does not vitiate the instrument as to honest debts secured to other creditors thereby, where the latter took the security in good faith, without knowledge of the fraud; Bradley Co. v. Paul, 94 Wis. 488, 69 N. W. 168, chattel mortgages are not fraudulent as purporting to secure a debt larger than actual debt and future advances, where the agreement was that the remainder of the money was to be advanced substantially at once.

25. Hawkins v. Alston, 39 N. C. (4 Ired. Eq.) 137, 145.

26. N. Y.—First Nat. Bank of Amsterdam v. Miller, 163 N. Y. 164, 57 N. E. 308; Masch v. Grauer, 58

conclusive badge of fraud, and in many cases will render a sale

App. Div. 560, 69 N. Y. Supp. 187; *Andreae v. Bourke*, 33 App. Div. 638, 53 N. Y. Supp. 885; *Laidlaw v. Gilmore*, 47 How. Pr. 67; *Delaware v. Ensign*, 21 Barb. 85; *Stoddard v. Butler*, 20 Wend. 507; *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513.

Ala.—*Marshall v. Croon*, 52 Ala. 554; *McCaskle v. Amarine*, 12 Ala. 17; *Seamans v. White*, 8 Ala. 656.

Ark.—*Apperson v. Burgett*, 33 Ark. 328.

Colo.—*Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342.

Conn.—*Clarke v. Black*, 78 Conn. 467, 62 Atl. 757; *Shelton v. Church*, 38 Conn. 416.

Fla.—*Loring v. Dunning*, 16 Fla. 119; *Barrow v. Bailey*, 5 Fla. 9.

Ga.—*Hawkinsville Bank, etc., Co. v. Walker*, 99 Ga. 242, 25 S. E. 205; *Scott v. Winship*, 20 Ga. 429.

Ill.—*Mathews v. Reinhardt*, 149 Ill. 635, 37 N. E. 85; *Stevens v. Dillman*, 86 Ill. 233; *Steere v. Hoagland*, 39 Ill. 264; *McArtee v. Engart*, 13 Ill. 242.

Ind.—*Hubbs v. Bancroft*, 4 Ind. 388. But see *Milburn v. Phillips*, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360.

Iowa.—*Urdangen & Greenburg Bros. v. Donner*, 122 Iowa, 533, 98 N. W. 317; *Mertens v. Welsing*, 85 Iowa, 508, 52 N. W. 362; *Bickler v. Kendall*, 66 Iowa, 703; *Boyd v. Ellis*, 11 Iowa, 97.

Kan.—*Dodson v. Cooper*, 50 Kan. 680, 32 Pac. 370; *Douthitt v. Applegate*, 33 Kan. 396.

Ky.—*Behan v. Warfield*, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439; *Easum v. Pirtle*, 81 Ky. 563, 5 Ky. L. Rep. 572; *Herrin v. Mor-*

ford, 9 Dana, 450; *Smead v. Williamson*, 16 B. Mon. 492; *Diamond Coal Co. v. Carter Dry Goods Co.*, 20 Ky. L. Rep. 1444, 49 S. W. 438.

Md.—*Fuller v. Brewster*, 53 Md. 358; *City of Baltimore v. Williams*, 6 Md. 235.

Mass.—*F. & M. Schaefer Brewing Co. v. Moebs*, 187 Mass. 571, 73 N. E. 858.

Mo.—*State v. Mason*, 112 Mo. 374, 34 Am. Rep. 390, 20 S. W. 629; *White v. Gibson*, 113 Mo. App. 568; *Stern Auction, etc., Co. v. Mason*, 16 Mo. App. 473; *Ames v. Gilmore*, 59 Mo. 537; *Robinson v. Robards*, 15 Mo. 459.

N. H.—*Claffin v. Batchelder*, 65 N. H. 29, 17 Atl. 1060.

N. J.—*Case v. McGill (Ch.)*, 60 Atl. 569, where a firm was heavily indebted, a sale by a member thereof, at the unusual discount of \$150, of two city warrants for \$1,000 each, payable to his order, for money due the firm from the city on a paving contract, was void as to the firm's creditors. See also *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35; *Gnitchel v. Jewell (Ch.)*, 41 Atl. 227.

Or.—*Brown v. Case*, 41 Or. 221, 69 Pac. 43.

Pa.—*Rhoads v. Blatt*, 84 Pa. St. 31; *Re Bossart's Estate*, 77 Pa. Super. Ct. 100. But see *Schatz v. Kirker*, 17 Wkly. Notes Cas. 43.

R. I.—*Re Sweet*, 20 R. I. 157, 159, 40 Atl. 502.

Tex.—*Bown v. Texas Cactus Hedge Co.*, 64 Tex. 396; *Moore v. Lowery*, 27 Tex. 541; *Clark v. Bell (Civ. App. 1905)*, 89 S. W. 38.

Va.—*Tebbs v. Lee*, 76 Va. 744; *Williamson v. Goodwyn*, 9 Gratt. 503.

void; but it may be explained.²⁷ Mere inadequacy of price or consideration alone, however, unattended by other circumstances casting suspicion upon the fairness of the transaction, is not sufficient to establish fraud.²⁸ A debtor may sell his property to pay

Wis.—Sommermeyer v. Schwartz, 89 Wis. 66, 61 N. W. 311; Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681.

U. S.—Bartles v. Gibson, 17 Fed. 293; Hudgins v. Kemp, 20 How. 45, 15 L. Ed. 853; Wright v. Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 11. But see Voorhees v. Blanton, 83 Fed. 234, holding that mere inadequacy of consideration in honest family settlements is not a badge of fraud.

Can.—Carradice v. Currie, 19 Grant Ch. (U. C.) 108; Crawford v. Meldoum, 3 Grant Err. App. (U. C.) 101.

Where a deed was intended as a mortgage, although absolute on its face, inadequacy of consideration is not material on the question of fraud as against the grantor's creditors. Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835.

27. U. S.—Surget v. Byers, 24 Fed. Cas. No. 13,629, Hemp. 115, *aff'd* Byers v. Surget, 60 U. S. (19 How.) 303, 15 L. Ed. 670.

Ala.—Bozman v. Draughan, 3 Stew. 243. See also Fairfield Packing Co. v. Kentucky Jeans Clothing Co., 110 Ala. 536, 20 So. 63; Gordon v. Tweedy, 71 Ala. 202.

Ark.—Galbreath v. Cook, 30 Ark. 417; Beebe v. De Baun, 8 Ark. 510.

Fla.—Gainer v. Russ, 20 Fla. 157.

Ill.—Jewett v. Cook, 81 Ill. 260; Monell v. Schenick, 54 Ill. 269; Bay v. Cook, 31 Ill. 336.

Ky.—Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397; Cincinnati Tobacco Warehouse Co. v.

Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242.

La.—Shultz v. Morgan, 27 La. Ann. 616.

Me.—Jones v. Light, 86 Me. 437, 30 Atl. 71; Wyman v. Brown, 50 Me. 139.

Mich.—Shay v. Wheeler, 69 Mich. 254, 37 N. W. 210.

Minn.—Carson v. Hawley, 82 Minn. 204, 84 N. W. 746.

Miss.—Foster v. Pugh, 12 Sm. & M. 416; Taylor v. Eckford, 11 Sm. & M. 21.

Mo.—Knoop v. Kelsey, 121 Mo. 642, 26 S. W. 683; State v. Mason, 112 Mo. 374, 34 Am. St. Rep. 390, 20 S. W. 629; St. Louis Brewing Assoc. v. Steimke, 68 Mo. App. 52; Ames v. Gilmore, 59 Mo. 537.

N. C.—Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328; Darden v. Skinner, 4 N. C. 259.

Pa.—Hamet v. Dundass, 4 Pa. St. 178. If the parties, although mistakenly, believe that the price is a fair one the transaction is not fraudulent. Re Bossart's Estate, 11 Pa. Super Ct. 100.

Tex.—Bryant v. Kelton, 1 Tex. 415.

Va.—Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

W. Va.—Livesay v. Beard, 22 W. Va. 585.

Eng.—Strong v. Strong, 18 Beau. 408, 52 Eng. Reprint, 161; Herne v. Meeres, 1 Vern. Ch. 465, 23 Eng. Reprint, 591.

Can.—Toronto Bank v. Irwin, 28 Grant Ch. (U. C.) 397.

28. N. Y.—Jaeger v. Kelley, 52

his debts for such consideration as he may agree to accept; and if there is nothing illegal in the transaction, it will be good as against his creditors.²⁹ Inadequacy of price upon the sale of property is a badge of fraud, though in itself it may not be sufficient to avoid the sale, unless the disparity between the true value and the price paid or agreed to be paid is so great as to strike the understanding with the conviction that the transaction was not *bona fide*.³⁰ A conveyance will not be set aside as in fraud of creditors for inadequacy of consideration, unless it is grossly

N. Y. 274; *Hardt v. Deutsch*, 22 Misc. Rep. 66, 48 N. Y. Supp. 564. See also *O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206; *Andreae v. Bourke*, 33 App. Div. 638, 53 N. Y. Supp. 885.

U. S.—*Kempner v. Churchill*, 8 Wall. 362, 19 L. Ed. 461.

Conn.—*Washband v. Washband*, 27 Conn. 424.

D. C.—*Clark v. Krause*, 2 Mackey, 559.

Ga.—*Sharp v. Hicks*, 94 Ga. 624, 21 S. E. 208.

Ill.—*Klemm v. Bishop*, 56 Ill. App. 613.

Iowa.—*Rusie v. Jameson*, 62 Iowa, 52, 17 N. W. 103.

Ky.—*Talbott v. Hooser*, 75 Ky. 408.

La.—*Montgomery v. Wilson*, 31 La. Ann. 196; *Keller v. Blanchard*, 19 La. Ann. 53.

Md.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. But see *Worthington v. Bullitt*, 6 Md. 172.

Miss.—*Foster v. Pugh*, 20 Miss. 416.

Mo.—*Demuth v. Boehler*, 11 Mo. App. 588; *Nelson Distilling Co. v. Vossmeier*, 25 Mo. App. 578; *Lionberger v. Baker*, 88 Mo. 447.

Mont.—*Mueller v. Renkes*, 77 Pac. 512; *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442.

N. J.—*Hudnit's Adm'rs v. Tomson*, 26 N. J. Eq. 239.

N. C.—*Wachonia Loan, etc., Co. v. Forbes*, 120 N. C. 355, 27 S. E. 43.

Ohio.—*Jones v. Leeds*, 7 Ohio N. P. 480, 10 Ohio S. & C. Pl. Dec. 173.

Or.—*Brown v. Case*, 41 Or. 221, 69 Pac. 43.

Pa.—*Goddard v. Weil*, 165 Pa. St. 419, 30 Atl. 1000, 36 Wkly. Notes Cas. 98; *Shatz v. Kirker*, 1 Pa. Cas. 332, 2 Atl. 93.

S. C.—*McPherson v. McPherson*, 21 S. C. 261.

Tex.—*Moore v. Lowery*, 27 Tex. 541.

Va.—*Moore v. Triplet*, 23 S. E. 69; *Sutherland v. March*, 75 Va. 223.

W. Va.—*Bierne v. Bay*, 37 W. Va. 571, 16 S. E. 804.

Eng.—*Blount v. Blount*, 3 Atk. 481, 26 Eng. Reprint 1076.

29. *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676; *Frank v. Peters*, 9 Ind. 343; *Hubbs v. Bancroft*, 4 Ind. 388; *Munsen v. Ellis*, 3 Tex. App. Civ. Cas., § 134. But see *Farmers' Bank v. Douglass*, 11 Sm. & M. (Miss.) 469.

30. *N. Y.*—*Morris v. Morris*, 71 Hun, 45, 24 N. Y. Supp. 579, where the nominal consideration was land worth \$1,000, while the grantor's equity in the land conveyed was worth \$3,500.

Ala.—*Borland v. Mayo*, 8 Ala. 104; *Prosser v. Henderson*, 11 Ala. 484, the consideration must be clearly in-

inadequate, and such as to indicate the existence of unfair dealing and fairly to induce the belief of fraud.³¹ Fraud in the sale of goods will not be inferred from inadequacy of consideration, unless such inadequacy is so great as to impress every person with its grossness.³² It has been held that "grossly inadequate consideration" means a consideration so far short of the real value of property as to shock a correct mind;³³ that inadequacy of consideration to constitute fraud must shock the conscience of the court;³⁴ and that the consideration must be so inadequate as to shock the conscience in order to render a conveyance void as to creditors for this reason alone.³⁵ Gross inadequacy of price, coupled with other circumstances tending to prove fraud, becomes conclusive,³⁶ and controlling proof of dishonesty and fraud.³⁷

adequate; *Pope v. Brandon*, 2 Stew. 401, 20 Am. Dec. 49. And see *Gamble v. C. Aultman & Co.*, 125 Ala. 372, 28 So. 30. The disparity between the consideration paid and the actual value of the property transferred must be shown to have existed at the time of the sale. *Miller v. Waller*, Dall. (Tex.) 416.

Mich.—*Noble v. Laidlaw*, 100 N. W. 179, 11 Det. Leg. N. 199, land worth \$4,000 conveyed for a consideration of \$2,000.

Mo.—*Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212; *Wells v. Thomas*, 10 Mo. 237.

Neb.—*Knight v. Darby*, 55 Neb. 16, 75 N. W. 48.

Ohio.—*Citizens' Nat. Bank v. Wehrle*, 18 Ohio Cir. Ct. 535, 9 O. C. D. 330; *Hamill v. Wright*, 18 Ohio S. & C. P. Dec. 467, 5 Ohio N. P. 9.

R. I.—*Re Sweet's Petition*, 20 R. I. 557, 40 Atl. 502.

S. C.—*McPherson v. McPherson*, 21 S. C. 261.

Tenn.—*McTeer v. Huntsman* (Ch. App.), 49 S. W. 57; *Merriman v. Lacefield*, 4 Heisk. 209, inadequacy of

price, to set aside sale, must be such as to constitute evidence of fraud.

Tex.—*Munson v. Ellis*, 3 Tex. App. Civ. Cas., § 134, 3 Willson, 136.

Vt.—*Church v. Chapin*, 35 Vt. 223.

W. Va.—*Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671, the fact that a larger price could have been obtained for the property by the debtor, had he sold on credit instead of for cash, was no ground for setting the conveyance aside.

Wis.—*Crocker v. Huntzicker*, 133 Wis. 181, 88 N. W. 232.

Wyo.—*Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

31. *Jenkins v. Hinstein*, 13 Fed. Cas. No. 7,265, 3 Biss. 128; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560.

32. *Cagney v. Cuson*, 77 Ind. 494.

33. *McGhee v. Wells*, 57 S. C. 280, 35 S. E. 529.

34. *Harbottle v. Rawlins*, 11 Hawaii, 105.

35. *Flook v. Armentrout's Adm'r*, 100 Va. 638, 42 S. E. 686.

36. *Boyd v. Ellis*, 11 Iowa, 97.

37. *Dodson v. Cooper*, 50 Kan. 680, 32 Pac. 379.

§ 5. **Excessive security.**—The fact that a mortgage or other similar conveyance given by a debtor to a creditor covers more property than will secure the mortgage or other indebtedness is not itself a badge of fraud, and will not, of itself, establish a fraudulent intent and render the conveyance invalid,³⁸ or author-

38. U. S.—*Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289, 15 Sup. Ct. 237, where the nominal value of property included in a chattel mortgage was more than twice the amount of debts secured thereby, but the property was a stock of goods of somewhat uncertain value which realized on the sale but little more than the amount of the debt; *Downs v. Kissam*, 51 U. S. 102, 13 L. Ed. 346.

D. C.—*Birdsall v. Welch*, 6 D. C. 316, since other creditors may, by paying the debt, release the property, or avail themselves by other modes of the equity of redemption; but the *bona fides* of such a transaction is always one of fact.

Fla.—*Mercantile Exch. Bank v. Taylor* (1900), 41 So. 22.

Ga.—*Carey v. Giles*, 10 Ga. 9.

Kan.—*Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961.

Mich.—*Michigan Trust Co. v. Bennett*, 106 Mich. 381, 64 N. W. 330, where the receiver of a firm, by paying the amount of the secured claim, was entitled to have a reconveyance of the property; *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721.

Miss.—*Taylor v. Watkins*, 13 So. 811, where the grantor's creditors under a deed of trust had a remedy by proceedings for the sale of his equity of redemption.

Neb.—*Tackaberry v. Gilmore*, 57 Neb. 450, 78 N. W. 32; *Kilpatrick-Koch Dry Goods Co. v. Straus*, 45 Neb. 793, 64 N. W. 223; *Grand*

Island Banking Co. v. Costello, 45 Neb. 119, 63 N. W. 376; *Grimes v. Farrington*, 19 Neb. 44, 26 N. W. 618; *Whitney v. Levon*, 34 Neb. 443, 51 N. W. 972; *Sherwin v. Gaghagen*, 39 Neb. 238, 7 N. W. 1005; *Dayton Spice Mills v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863, 62 N. W. 1105; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 800, 56 N. W. 389.

N. C.—*Burgin v. Burgin*, 23 N. C. 453.

S. D.—*Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 256, 58 N. W. 557, 559; *Sprague v. Gardiner*, id.

Tenn.—*Roane v. Bank of Nashville*, 38 Tenn. 526, especially when the property conveyed is subject to liens.

Wis.—*Cunningham v. Eagan*, 102 Wis. 272, 78 N. W. 402; *Menzesheimer v. Kennedy*, 75 Wis. 411, 44 N. W. 508.

Mortgage held to be an assignment.—A finding that a mortgage of land was an assignment by the mortgagor of his property to one creditor to the exclusion of other creditors, will not be disturbed where it appears that the mortgage covered all of the mortgagor's land, and, with other mortgages on the land, amounted to over seven-eighths of its value, and there was no other property out of which creditors for over \$4,000 could collect their claims. *Mitchell v. Mitchell*, 42 S. C. 475, 20 S. E. 405.

Stipulation for delay in fore-

ize a presumption of fraud. It does not raise a presumption of fraud in the absence of circumstances showing bad faith.³⁹ But that the property conveyed is greater in value than the debt secured is a circumstance to be submitted to a jury, in connection with other facts to aid them in determining whether the intention of the parties was *bona fide* or otherwise, or to be considered by the court in determining whether the transaction was in fraud of creditors.⁴⁰ And where the property exceeds greatly in value the amount of the debts secured, it is a circumstance from which fraud may be inferred,⁴¹ is *prima facie* evidence of fraud,⁴² and raises a presumption of fraud,⁴³ which may, however, be explained by other evidence.

closure.—A mortgage of nearly all the debtor's estate to a principal creditor, fifty per cent. more in value than the debt secured, with a stipulation for two years' delay in its foreclosure, is void. *Reynolds v. Welsh*, 47 Ala. 200.

Several chattel mortgages simultaneously executed to secure debts, the aggregate of which is not unreasonably less than the value of the property mortgaged, are not void, because no one of such debts is in itself sufficient to justify so great a security. *Jones v. Loree*, 37 Neb. 816, 56 N. W. 390.

Excessive security in a trust deed.—Where there is more property included in a trust deed than is sufficient to satisfy all the debts secured by it, a pursuing creditor may file a bill against all the parties interested to have the trust closed and the property subjected, first to the payment of the trust debts, and the excess to the satisfaction of the complainant's debts. *Cornish v. Dews*, 18 Ark. 172.

Speculative value.—The assignment of a right of action with a speculative value is not fraudulent as to other creditors because its value is in excess of the debts secured. *Hut-*

macher v. Anheuser-Busch Brewing Co., 71 Ill. App. 154.

39. *Boessneck v. Cohn*, 7 N. Y. Supp. 620.

40. *U. S.*—*Smith v. New York L. Ins. Co.*, 57 Fed. 133.

Iowa.—*Richards v. Schreiber*, 98 Iowa, 422, 67 N. W. 569; *Lycoming Rubber Co. v. King*, 90 Iowa, 343, 57 N. W. 864.

Mich.—*Showman v. Lee*, 86 Mich. 556, 49 N. W. 578; *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440.

Mo.—*Colbern v. Robinson*, 80 Mo. 541; *McKinney v. Wade*, 43 Mo. App. 152.

Neb.—*Tackaberry v. Gilmore*, 57 Neb. 450, 78 N. W. 32; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb. 793, 64 N. W. 223; *Smith v. Boyer*, 29 Neb. 76, 45 N. W. 265, 26 Am. St. Rep. 373.

N. J.—*Clinton Hill Lumber Co. v. Strieby*, 52 N. J. Eq. 576, 29 Atl. 589.

N. C.—*Burgin v. Burgin*, 23 N. C. 453.

Ohio.—*Brinkerhoff v. Tracy*, 55 Ohio St. 558, 45 N. E. 1100.

41. *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497.

42. *Howerton v. Holt*, 23 Tex. 52.

43. *Ala.*—*Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429.

§ 6. **Excess in amount secured.**—A mortgage executed by a debtor in failing circumstances, for a sum known by the creditor at the time to be in excess of what is actually due, is presumptively fraudulent.⁴⁴ A judgment obtained by a creditor from his debtor by confession for a sum greater than is actually due is likewise

Kan.—*Williams v. Stowell* (Kan. App.), 48 Pac. 894.

Neb.—*First Nat. Bank v. East Omaha Box Co.*, 90 N. W. 223, 2 Neb. (Unoff.) 820; *Whitney v. Levon*, 34 Neb. 443, 51 N. W. 972; *Thompson v. Richardson Drug Co.*, 33 Neb. 714, 29 Am. St. Rep. 505, 50 N. W. 948.

Tex.—*Crosby v. Huston*, 1 Tex. 203.

Where chattel mortgage is only a lien.—Under a statute which makes a chattel mortgage a lien only on the mortgaged property, and allows a creditor to levy on the mortgaged property after paying or tendering the amount for which such a mortgage is a *bona fide* lien, the taking of a mortgage on \$10,000 worth of property, to secure a debt of \$1,800, is not, on that account, fraudulent. *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 256, 58 N. W. 557, 559.

Conveyances to secure debt not yet due.—A trust deed of all the debtor's property to secure a debt of one-third the value of such property, and which has 2½ years to run, is a fraudulent conveyance. *Hartman v. Allen*, 77 Tenn. L. 657.

Where a person owns property to the amount of \$5,700, and is indebted to the amount of \$5,000, and executes mortgages on all his property to secure \$1,800, not yet due, to one creditor, these mortgages are fraudulent as to the rest of his creditors. *Brown v. Work*, 30 Neb. 800, 47 N. W. 192.

A mortgage given to secure the payment of a debt not due for three years, covering land worth three times the amount of the debt, and executed when the grantor was threatened by another creditor with suit, is fraudulent as to creditors. *Lee v. Wathen*, 42 Ky. 297.

Surplus liable to trustee process.—Where an assignment of a large amount of property was made for the payment of a small amount of debts, it was held that if it was made in good faith to secure debts fairly due, and with the intention that the surplus should be liable to the trustee process in the assignee's hands, the assignee received and could convey a valid title. *George v. Kimball*, 41 Mass. 234.

44. *U. S.*—*Kellogg v. Clyne*, 54 Fed. 696, 4 C. C. A. 554.

Ala.—*Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86.

Ill.—*Strauss v. Kranert*, 56 Ill. 254.

Iowa.—*Carson v. Byers*, 67 Iowa, 606, 25 N. W. 826; *Lombard v. Dows*, 66 Iowa, 243, 23 N. W. 649; *Davenport v. Cummings*, 15 Iowa, 219.

Kan.—*Smith v. Parry Mfg. Co.*, 9 Kan. App. 877, 61 Pac. 966.

Mich.—*Patrick v. Riggs*, 105 Mich. 616, 63 N. W. 532.

Mo.—*Imhoff v. McArthur*, 146 Mo. 371, 48 S. W. 456. See also *Consideration; excess in amount secured*, chap. VIII, § 20, *infra*.

presumptively fraudulent.⁴⁵ A trust deed given for a greater sum than is actually due is void.⁴⁶ A bond taken for more than the real debt, with intent to defraud the obligor's creditors, is entirely void as to such creditors.⁴⁷ Judgment notes purposely given to preferred creditors, or judgments confessed, for sums largely in excess of the amounts due them, and afterwards satisfied in full, are fraudulent as to other creditors thereby prevented from receiving payment.⁴⁸ But the mere fact that a mortgage given by an insolvent secures a greater sum than is actually due is not necessarily conclusive of fraud.⁴⁹ A mortgage in excess of the actual indebtedness, executed without any intention to defraud, to take up a prior mortgage for an actual indebtedness, all the credits on the old note to be applied to the new, is not void *in toto*.⁵⁰

§ 7. Transfers in anticipation of or pending legal proceedings.

—A voluntary conveyance of property made by a debtor in

45. *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *Appeal of Meckley*, 102 Pa. St. 536; *Clark v. Douglass*, 62 Pa. St. 415; *Davenport v. Wright*, 51 Pa. St. 292.

46. *Bates County Bank v. Gailey*, 177 Mo. 181, 75 S. W. 646.

47. *Whiting v. Johnson*, 11 Serg. & R. (Pa.) 328, 14 Am. Dec. 633.

48. *Hardt v. Heidweyer*, 152 U. S. 147, 17 Sup. Ct. 671, 38 L. Ed. 548; *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66.

49. *Ill.*—*Sawyer v. Bradshaw*, 125 Ill. 440, 17 N. E. 812; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Upton v. Craig*, 57 Ill. 257; *Wooley v. Fry*, 30 Ill. 158.

Ind.—*Adams v. Laugel*, 144 Ind. 608, 42 N. E. 1017; *Goff v. Rogers*, 71 Ind. 459.

Iowa.—*Wood v. Scott*, 55 Iowa, 114, 7 N. W. 465.

Kan.—*Bowling v. Searles*, 57 Kan. 174, 45 Pac. 584; *Bush v. Bush*, 33

Kan. 556, 6 Pac. 794. *Compare McCord, etc., Mercantile Co. v. Burson*, 38 Kan. 278, 16 Pac. 664.

Mich.—*Louden v. Vinton*, 108 Mich. 313, 66 N. W. 222; *Brace v. Berdan*, 104 Mich. 356, 62 N. W. 568; *Lyon v. Ballentine*, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

Minn.—*Heim v. Chapel*, 62 Minn. 338, 64 N. W. 825; *Nazro v. Ware*, 38 Minn. 443, 38 N. W. 359.

N. H.—*Whittredge v. Edmunds*, 63 N. H. 248; *Putnam v. Osgood*, 52 N. H. 148.

Pa.—*Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75.

Wis.—*Liner v. Thielke*, 115 Wis. 389, 91 N. W. 975; *Barkow v. Sanger*, 47 Wis. 500, 3 N. W. 16; *Bradley Co. v. Paul*, 94 Wis. 488, 69 N. W. 168. See also *Consideration; excess in amount secured*, chap. VIII, § 20, *infra*.

50. *Hughes v. Shull*, 33 Kan. 127, 133, 5 Pac. 414, 770.

anticipation of a suit against him or in apprehension of future litigation is a badge of fraud.⁵¹ A transfer by a debtor of his property during the pendency of a suit against him is a badge of fraud.⁵² But the mere pendency of a suit against him

51. *N. Y.*—Fuller v. Brown, 76 Hun (N. Y.), 557, 28 N. Y. Supp. 189.

Ala.—Scott v. Brown, 106 Ala. 604, 17 So. 731.

Ill.—Dunaway v. Robertson, 95 Ill. 419.

Ind.—Shean v. Shay, 42 Ind. 375, 13 Am. Rep. 366.

Iowa.—Corder v. Williams, 40 Iowa, 582; Weir v. Day, 57 Iowa, 84, 10 N. W. 304.

La.—See Riske v. Rotan Grocery Co.

Md.—Gebhart v. Merfeld, 51 Md. 322.

N. J.—Morris Canal, etc., Co. v. Stearns, 23 N. J. Eq. 414, conveyance after a claim was in the hands of an attorney for collection and the prosecution was being delayed at the debtor's request; Boid v. Dean, 48 N. J. Eq. 193, 21 Atl. 618, a transfer of property without consideration for the purpose of enabling the transferrer thereafter to commit a tort with impunity, is fraudulent and void as against a creditor by judgment founded on such tort.

Ohio.—McVeigh v. Ritenour, 40 Ohio St. 107; LaRoche v. Brower, 8 Ohio Cir. Ct. 508, 5 Ohio Cir. Dec. 432.

Tenn.—Lewis v. Gibson, 1 Tenn. Cas. 163, Thomp. Cas. 234. But a conveyance made in contemplation of an action of tort and a recovery therein, which provides for the payment of certain preferred claims, and then for the payment of all creditors of the maker, is not fraudulent, as it

provides, whether so intended or not, for the recovery in the action of tort. Vance v. Smith, 2 Heisk. 343.

Tex.—See Riske v. Rotan Grocery Co. (Civ. App. 1906), 93 S. W. 708.

W. Va.—State v. Burkeholder, 30 W. Va. 593, 5 S. E. 439.

Eng.—Alton v. Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034.

52. *N. Y.*—Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615, a transfer by a corporation of all its property and effects, which had the effect of terminating the regular business of the corporation, and was made and accepted by the transferee with that purpose, is illegal as against creditors of the corporation, whose rights are thereby sacrificed and their remedies destroyed; Maasch v. Grauer, 58 App. Div. 560, 69 N. Y. Supp. 187; Ford v. Johnston, 7 Hun, 563; Stoddard v. Butler, 20 Wend. 507; 1 Hill, 143.

Reconveyance after illegal conveyance.—Where land was conveyed for the purpose of qualifying the grantor to be a voter, no consideration being paid and the grantor remaining in possession, a reconveyance to such grantor during the pendency of a suit against the grantor, was not void by the Statute of Frauds, not being made to defraud creditors, nor was it void as against a purchaser even for valuable consideration at sheriff's sale on execution against the grantor; for those voluntary deeds which the statute avoids

will not preclude a debtor from conveying his property in good

as to a subsequent purchaser must have been made with intent to deceive, the evidence of which is the voluntary conveyance, coupled with a subsequent agreement to sell, which cannot be the case where the purchase is made, not of the party, but through the intervention of the law. *Jackson v. Ham*, 15 Johns. (N. Y.) 261.

U. S.—*Dent v. Ferguson*, 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242; *Hudgins v. Kemp*, 61 U. S. 45, 15 L. Ed. 853.

Ala.—*Crawford v. Kiksey*, 50 Ala. 590; *Williams v. Jones*, 2 Ala. 314.

Ark.—*Reeves v. Sherwood*, 45 Ark. 520.

Ga.—*Gregory v. Gray*, 88 Ga. 172, 14 S. E. 187; *Hoffer v. Gladden*, 75 Ga. 532; *Smith v. Wellborn*, 75 Ga. 799; *Barber v. Terrell*, 54 Ga. 146.

Ind.—*Ray v. Roe*, 2 Blackf. 258, 18 Am. Dec. 159.

Ky.—*Anglin v. Conley*, 114 Ky. 741, 24 Ky. L. Rep. 1551, 71 S. W. 926; *Behan v. Warfield*, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439; *Ward v. Totter*, 19 Ky. 1; *Herrin v. Morford*, 9 Dana, 450; *Lillard v. McGee*, 4 Bibb. 165.

La.—*Dallas Brewing Co. v. Holzner*, 116 La. 719, 41 So. 48; *Goodwell v. Minchew*, 26 La. Ann. 621.

Me.—*Thompson v. Robinson*, 89 Me. 46, 35 Atl. 1002; *Hartshorn v. Eames*, 31 Me. 93.

Md.—*Shaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708.

Mo.—*Mason v. Perkins*, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; *McCollum v. Crain* (App.), 74 S. W. 650, the fact that the suit is in tort makes no difference.

N. J.—*Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361; *Christie v.*

Bridgman, 51 N. J. Eq. 331, 30 Atl. 429, 25 Atl. 939; *Moore v. Roe*, 35 N. J. Eq. 90; *Randall v. Vroom*, 30 N. J. Eq. 353; *Morris Canal, etc., Co. v. Stearns*, 23 N. J. Eq. 414.

Ohio.—*Fisher v. Schlosser*, 41 Ohio St. 147; *Barr v. Hatch*, 3 Ohio, 527.

Pa.—*Redfield, etc., Mfg. Co. v. Dysart*, 62 Pa. St. 62; *Streep v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258; *Avery v. Street*, 6 Watts, 247.

S. C.—*Smith v. Culbertson*, 9 Rich. L. 106; *Pettus v. Smith*, 4 Rich. Eq. 197; *Watson v. Kennedy*, 3 Strob. Eq. 1; *Smith v. Henry*, 2 Bailey, 118; *Hipp v. Sawyer*, 1 Rich. Eq. Cas. 410.

Tenn.—*Carter v. Baker*, 10 Heisk. 640.

Va.—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Click v. Green*, 77 Va. 827.

W. Va.—*Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960; *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717.

Wis.—*Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919; *Hoffman v. Junk*, 51 Wis. 613, 8 N. W. 493; *Godfrey v. Germain*, 24 Wis. 410.

Eng.—*Barling v. Bishopp*, 29 Beav. 417, 8 Wkly. Rep. 631, 6 Jur. N. S. 812, 54 Eng. Reprint, 689; *Blenkinsopp v. Blenkinsopp*, 1 DeG. M. & G. 495, 21 L. J. Ch. 401, 16 Jur. 787, 50 Eng. Ch. 379, 42 Eng. Reprint, 644; *Twyne's Case*, 3 Coke, 80a, 1 Smith's Lead. Cas. 1.

Judgment for costs.—A voluntary conveyance of land, made in good faith by a plaintiff pending a personal action, is valid as against a judgment and execution, for costs, subsequently recovered therein against

faith for a good consideration.⁵³ A gift,⁵⁴ confession of judg-

him. *Inhabitants of Pelham v. Aldrich*, 78 Mass. 515, 69 Am. Dec. 266.

Mutual rights and liabilities of parties.—A bill for the recovery of realty alleged that a divorce suit was pending against plaintiff, and that she deeded the land to defendant "on account of said litigation, and to protect herself in the matter of alimony;" that defendant gave plaintiff a bond for reconveyance, fully describing the property, which was recorded; and that the decree for alimony rendered against plaintiff had been paid. Held not demurrable for disclosing fraud in plaintiff precluding relief. *Stockwell v. Stockwell*, 72 N. H. 69, 54 Atl. 701.

Receipt to a garnishee.—A jury are not warranted in finding that a receipt given by a defendant to a garnishee is false and fraudulent, when there is no evidence to falsify it or cast suspicion upon the honesty of the settlement, except that it bore date on the day before the rendition of the judgment against the defendant. *Howard v. Crawford*, 21 Tex. 399.

53. Ala.—*Crawford v. Kirksey*, 50 Ala. 590.

D. C.—*Birdsall v. Welch*, 6 D. C. 316, as by assignment of his property as security for the payment of a creditor's claim.

Ill.—*Coan v. Morrison*, 34 Ill. App. 352, where a deed was given in good faith to secure *bona fide* claims against the debtor in favor of his mother, pending a bastardy suit.

Ind.—*Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676.

Kan.—*Berkley v. Tootle*, 46 Kan. 335, 26 Pac. 730.

Ky.—*Ward v. Trooter*, 19 Ky. 1.

Miss.—*Surget v. Boyd*, 57 Miss.

485, a trust deed, made by a debtor to secure pre-existing debts due his friends and relatives, is valid if executed without any fraudulent intent.

Mo.—*Kuykeydall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 412, a debtor may give preference to particular creditors by a direct payment or assignment, if he does so in payment of their just demands, and not as a mere screen to secure the property to himself.

Or.—*Garnier v. Wheeler*, 4 Or. 198, 66 Pac. 812.

Va.—*Sipe v. Earman*, 26 Grat. 563.

Transfer after extension of time to answer.—In the absence of fraud, judgments by confession will not be set aside simply because they were given by defendant after obtaining from plaintiff an extension of time to answer in an action then pending. *Wood v. Mitchell*, 63 Hun (N. Y.), 629, 17 N. Y. Supp. 732. But when the right to enter judgment is postponed by the fraud of the defendant in securing such extension of time the judgments so confessed are fraudulent and void as to the plaintiff, though the persons in whose favor they were confessed did not participate in the fraud. *H. B. Claffin Co. v. Arnheim*, 87 Hun (N. Y.), 236, 33 N. Y. Supp. 1037, 1 N. Y. Ann. Cas. 391; *Clark v. Taylor*, 37 Hun (N. Y.), 312; *Jaques v. Greenwood*, 12 Abb. Pr. (N. Y.) 232.

Transfer pending execution.—The sale by a debtor, apparently insolvent, of his personal property, after issuing of an execution against him, to one who had notice that the execution was in the hands of the sheriff, is void as against the creditors

ment,⁵⁵ assignment,⁵⁶ or other transfer of property,⁵⁷ made by a debtor in anticipation of an attachment and to prevent it from

of the vendor, as fraudulent both in law and in fact. *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Streeper v. Eckart*, 2 Whart. (Pa.) 302, 30 Am. Dec. 258. But a conveyance of land, made by a debtor after he is charged in execution, if *bona fide* and for a reasonable consideration, and without any secret trust for the benefit of the debtor, is valid against creditors. *Bullock v. Gordon*, 4 Munf. (Va.) 450.

Transfer, pending action to review, of property, without consideration, is fraudulent, since the plaintiff in review is not to be regarded as a subsequent creditor. *Parsons v. McKnight*, 8 N. H. 35.

Effect of transfer as to subsequent creditors.—A conveyance of real estate pending an action against the grantor does not of itself render such conveyance void as to subsequent creditors. *Ray v. Roe*, 2 Blackf. (Ind.) 258, 18 Am. Dec. 159.

Effect of failure to recover.—If a conveyance be made to defeat an expected recovery in a suit, it will not be deemed fraudulent to defeat creditors, should the recovery not take place. *Bardy v. Ellison*, 3 N. C. 533, 2 Hayw. 348.

A transfer pending supplementary proceedings, of property by mortgage to other creditors, to secure debts for about one-half the amount of the mortgage, is void as to the claim of the judgment creditor. *DeWitt v. Van Sickle*, 29 N. J. Eq. 209.

The execution of a mortgage upon the same day that a judgment was rendered against the mort-

gagor is not alone sufficient to attach to it the imputation of fraud. *Thornton v. Davenport*, 2 Ill. 296, 29 Am. Dec. 358.

54. *Trager v. Feibleman*, 95 Ala. 60, 10 So. 213.

55. *Ryan v. Daly*, 6 Cal. 238.

56. *Gragg v. Martin*, 12 Allen (Mass.), 498, 90 Am. Dec. 164, an assignment of future wages.

57. *Marsh v. Davis*, 24 Vt. 363, a transfer of promissory note.

Evidence of fraudulent intent.—A general intent to defraud cannot be inferred from the mere fact that a debtor made a general assignment for the benefit of creditors, or that he preferred some of his creditors to others, or that he turned out property in payment to certain creditors after an attachment had been levied in favor of another creditor, and before executing his general assignment. *Lord v. Devendorf*, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58; *Messersmith v. Devendorf*, 54 Wis. 498, 11 N. W. 906.

Where attachment is dismissed.—Where at the time of a conveyance of a debtor's land, an attachment had been delivered to the sheriff, but had not been levied, of which the grantee had no knowledge, and the attachment was not levied, but was thereafter dismissed, the conveyance is not affected or rendered fraudulent by the pendency of the attachment. *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676.

Payment under mistake of law.—The facts that at the time of the payment by a mortgagor to the mortgagee of the proceed of his crops, his creditors was pressing him, and

being attached, is fraudulent as to creditors. A conveyance in anticipation of a deficiency judgment on foreclosure is fraudulent as against the mortgagee.⁵⁸ A conveyance made pending a suit against the grantor, for the purpose of preventing the collection of such judgment for damages as may be recovered against him, and with knowledge of the grantee that it is so made, may be set aside at the instance of the plaintiff in such suit, after judgment for him therein, whether made with or without adequate consideration.⁵⁹ A conveyance made pending an action of tort against the grantor, with intent to defeat the collection of any judgment that may be recovered against the grantor in such action is fraudulent and void,⁶⁰ even though such conveyance is made on good consideration, if the grantee had knowledge of or participated in this purpose.⁶¹ It is a badge of fraud that a conveyance was made after the rendition of a verdict in favor of a creditor, and while a stay of proceedings was in force.⁶²

§ 8. **Transfer of all the debtor's property.**—The voluntary conveyance or disposition of all or substantially all of his property by a debtor, who is insolvent or largely in debt with creditors pressing, is a badge of fraud.⁶³ A *prima facie* case of fraud

fears were expressed that the same might be attached, did not render the payment fraudulent as to creditors, where it was made under mistake of law by all the parties that the mortgagee was entitled thereto. *Gregory v. Clabrough's Ex'rs*, 129 Cal. 475, 62 Pac. 72.

58. *Hoboken Sav. Bank v. Beekman*, 36 N. J. Eq. 83; 33 N. J. Eq. 53.

59. *Rogers v. Evans*, 3 Ind. 574, 56 Am. Dec. 537; *Wright v. Brandis*, 1 Ind. 336; *Smith v. Culbertson*, 9 Rich. (S. C.) 106; *Goshorn v. Snodgrass*, 17 W. Va. 717.

60. *N. Y.—Ford v. Johnston*, 7

Hun, 563; *Jackson v. Myers*, 18 Johns. 425.

D. C.—Barth v. Heider, 7 D. C. 71. *Me.—Tobie, etc., Mfg. Co. v. Waldron*, 75 Me. 472.

N. J.—Scott v. Hartman, 26 N. J. Eq. 89.

Tenn.—Farnsworth v. Bell, 2 Sneed, 531.

Va.—Johnson v. Wagner, 76 Va. 587.

61. *Cooke v. Cooke*, 43 Md. 522.

62. *Maasch v. Parkin*, 58 App. Div. (N. Y.) 560, 69 N. Y. Supp. 187.

63. *N. Y.—St. John Wood-Working Co. v. Smith*, 178 N. Y. 629, 71 N. E. 1139, *aff'd* 82 App. Div. (N. Y.)

is made, requiring a full and satisfactory explanation on the part of the grantee or purchaser in respect to the nature of the

348, 82 N. Y. Supp. 1025; *Barker v. Franklin*, 37 Misc. Rep. 292, 75 N. Y. Supp. 305; *Clark v. Wise*, 46 N. Y. 612, *rev'g* 39 How. Pr. 97; *Wheeler v. Brady*, 4 Thomp. & C. 547; *Browning v. Hart*, 6 Barb. 91; *Litchfield v. Pelton*, 6 Barb. 187. But see *Ruhl v. Phillips*, 48 N. Y. 125, 8 Am. Rep. 522, *rev'g* 2 Daly, 45, holding that the sale of all the effects of an insolvent copartnership, upon credit, at a fair valuation, to a responsible purchaser, although made by the vendor, with intent to hinder, delay and defraud creditors, and although the purchaser knew of this insolvency, is not voidable unless the purchaser knew of the fraudulent intent.

U. S.—*Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603.

Ark.—*Ringgold v. Waggoner*, 14 Ark. 69.

Cal.—*Ballou v. Andrews Banking Co.*, 128 Cal. 562, 61 Pac. 102, a transfer of all the firm account books and accounts is *prima facie* fraudulent; *Daugherty v. Daugherty*, 104 Cal. 221, 37 Pac. 889.

Conn.—*Redfield v. Buck*, 35 Conn. 328, 95 Am. Dec. 241, such a conveyance is constructively fraudulent against a subsequent judgment debtor. A conveyance made without consideration by a husband to his wife of all his real estate, is void as to his creditors, although not executed with intent to defraud them, when his liabilities exceeded his remaining assets. *Quinnipiac Brewing Co. v. Fitzgibbons*, 71 Conn. 80, 40 Atl. 913. But mere proof that the parties were husband and wife, and that the conveyance was made while the husband

owed a debt to the plaintiff which he had not paid, does not, as matter of law, establish fraud, either actual or constructive. *Fishel & Levy v. Motta*, 76 Conn. 197, 56 Atl. 558.

Ga.—*Hoffer v. Gladden*, 75 Ga. 532. But the rule that the sale of the whole of one's property is a badge of fraud as against creditors does not apply between the creditors and the purchaser of a small part thereof. *Scott v. Winship*, 20 Ca. 429.

Iowa.—*Barhydt v. Perry*, 57 Iowa, 416, 10 N. W. 820, the voluntary transfer by an outgoing partner of a firm, which was largely indebted, of all his individual property, is constructively fraudulent; *Glenn v. Glenn*, 17 Iowa, 498. But a transfer of all the debtor's property to pay a *bona fide* pre-existing debt is not, *per se*, fraudulent as to creditors. *Cowles v. Ricketts*, 1 Iowa, 582.

Kan.—*Roberts v. Radcliff*, 35 Kan. 502, 11 Pac. 436, where a failing milliner sold his stock to a lawyer, residing in a distant town, for one-half its cost, on a long credit, unsecured notes being given, and the milliner remaining in possession in the employ of the lawyer, it was held that a verdict finding the sale invalid should not be disturbed.

Ky.—*Herrin v. Morford*, 39 Ky. 450; *Heiatt v. Barnes Adm'r*, 35 Ky. 219; *Bradley v. Buford*, 2 Ky. 12, 2 Am. Dec. 703, especially when secretly made.

La.—*Gregg v. Lee*, 37 La. Ann. 164, a sale by an insolvent of all his property on credit to an impecunious buyer is fraudulent. *Emswiler v. Burham*, 6 La. Ann. 710.

consideration and the honesty of the transaction.⁶⁴ The purchaser is charged with notice of the circumstances and the probable effect upon creditors of the seller in hindering, delaying or defrauding them.⁶⁵ Persons taking a confession of judgment virtually swallowing up the whole estate of a failing debtor have the burden, when such judgment is attacked by other creditors, of giving a reasonable explanation of the transaction, and satisfactorily showing the consideration on which it was founded; and unless they do so, it may fairly be inferred that the judgment was without consideration and fraudulent.⁶⁶ But it is not a badge of fraud that the debtor conveys away his whole property

Me.—Hartshorn v. Eames, 31 Me. 93.

Md.—Zimmer v. Miller, 64 Md. 296, 1 Atl. 858; Ecker v. McAllister, 45 Md. 290.

Miss.—Pope v. Andrews, Sm. & M. Co. 135.

Mo.—Jacob Furth Grocery Co. v. May, 78 Mo. App. 323; Seger v. Thomas, 107 Mo. 635, 18 S. W. 33; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82.

Neb.—Nebraska Moline Plow Co. v. Klingman, 48 Neb. 204, 60 N. W. 1101, such a sale is evidence of fraudulent intent, but is not in itself conclusive evidence; Karll v. Kuhn, 38 Neb. 539, 57 N. W. 397. But see Goldsmith v. Erickson, 48 Neb. 48, 66 N. W. 1029, holding that a conveyance by a debtor to one of his creditors will not be deemed fraudulent merely because the property conveyed was substantially all that the vendor owned.

N. J.—Moore v. Roe, 35 N. J. Eq. 90.

Pa.—Ditchburn v. Jermyn, 13 Pa. Co. Ct. 1.

R. I.—Sarle v. Arnold, 7 R. I. 582.

S. C.—Wade v. Colvert, 2 Mill Const. 26, 12 Am. Dec. 652.

Tex.—Green v. Banks, 24 Tex. 522; Reynolds v. Lansford, 16 Tex. 286; Wallace v. Butts (Tex. Civ. App.), 31 S. W. 687, it is not necessary that a fraudulent sale should have placed all the debtor's property beyond the reach of his creditors, in order to have it declared void in an action against the vendee.

Vt.—Amsden v. Fitch, 67 Vt. 522, 32 Atl. 478, such a sale is *prima facie* evidence of fraud under the statute, as not made in the usual and ordinary course of business.

W. Va.—Reilly v. Barr, 34 W. Va. 95, 11 S. E. 750.

Wis.—Bigelow v. Doolittle, 36 Wis. 115, it affords a presumption of fraudulent intent so far as existing creditors are concerned.

Eng.—Twyne's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1.

64. Welch v. Bradley, 45 Minn. 540, 48 N. W. 440.

65. Beels v. Flynn, 28 Neb. 575, 26 Am. St. Rep. 351, 44 N. W. 732.

66. Ditchburn v. Jermyn, 13 Pa. Co. Ct. 1.

at different times by deeds and levies of executions, although they passed chiefly into the hands of one person.⁶⁷

§ 9. **Excessive effort to give appearance of fairness.**—Circumstances connected with the transfer or disposition of property indicating excessive effort to give it the appearance of regularity or fairness, which are not the usual attendants of such business transactions, are badges of fraud.⁶⁸ Honesty requires no stratagem or subterfuge to support and aid it. Over-caution is one of the settled *indicia* of fraud and evinces a diffidence in the rectitude of the transaction and excites a corresponding solicitude to provide defences for its protection.⁶⁹ Among the signs and marks of fraud enumerated in the famous Twyne's Case was the fact that the deed expressed that the gift was made honestly, truly and *bona fide*; *et clausulae inconsueto semper inducunt suspicionem*.⁷⁰ But it has been held that, although the title, upon a sale of personal property, passes to the purchaser by delivery, and no bill of sale is necessary, the taking of a bill of sale attested by a witness is not of itself a badge of fraud;⁷¹ and that the fact that a transfer of personal property was evidenced by an elaborate written instrument is a circumstance of but slight importance in determining fraud.⁷²

§ 10. **Suspicious circumstances unexplained.**—Where the circumstances attending a transfer of property by a debtor are suspicious, the failure of the parties to furnish some proof of the *bona fides* of the conveyance, or to offer themselves as witnesses, or to testify, or to produce explanatory evidence to rebut the suspicious circumstances, is a badge of fraud.⁷³

67. Preston v. Griffin, 1 Conn. 393.

68. Hart v. Sandy, 39 W. Va. 644, 20 S. E. 665; Comstock v. Rayford, 12 Sm. & M. (Miss.) 369; Twyne's Case, 3 Coke 80a, 1 Smith Lead. Cas. 1.

69. Loeschigk v. Addison, 19 Abb.

Pr. (N. Y.) 169; Sands v. Codwise, 4 Johns. (N. Y.) 567, 591.

70. Twyne's Case, *supra*.

71. Kane v. Drake, 27 Ind. 29.

72. Forsyth v. Matthews, 14 Pa. St. 100, 53 Am. Dec. 522.

73. Iowa.—Glenn v. Glenn, 17 Iowa, 498.

§ 11. **Transfer without change of possession.**—The fact that a transfer of property by a debtor was unaccompanied by an actual and continued change of possession, management, or control is, in the absence of explanation, a badge of fraud.⁷⁴ The unexplained retention of the possession or apparent title by the grantor is a badge of fraud, going to the fact of the sale and the sufficiency of the consideration, and casts upon the purchaser the burden of explaining the vendor's continued possession, so

Ky.—Behan v. Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439.

Mo.—Leeper v. Bates, 85 Mo. 224; Goldsby v. Johnson, 82 Mo. 602; Henderson v. Henderson, 55 Mo. 534.

N. C.—Helms v. Green, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470.

Tenn.—Shapira v. Paletz (Ch. App. 1900), 59 S. W. 774.

W. Va.—Knight v. Capito, 23 W. Va. 639.

Wis.—Mace v. Roberts, 97 Wis. 199, 72 N. W. 866.

Wyo.—Stirling v. Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

74. *N. Y.*—First Nat. Bank v. Miller, 163 N. Y. 164, 57 N. E. 308; St. John Wood-Working Co. v. Smith, 178 N. Y. 629, 71 N. E. 1139, *aff'g* 82 App. Div. 348, 82 N. Y. Supp. 1025.

Ala.—Marshall v. Croom, 52 Ala. 554; Moog v. Benedicks, 49 Ala. 512.

Ark.—Ringgold v. Waggoner, 14 Ark. 69.

Cal.—Daugherty v. Daugherty, 104 Cal. 221, 37 Pac. 889.

Ga.—Ross v. Cooley, 113 Ga. 1047, 39 S. E. 471; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Iowa.—Glenn v. Glenn, 17 Iowa, 498.

Ky.—Behan v. Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W.

439; Herrin v. Morford, 9 Dana, 450.

La.—Goothye v. DeLatour, 111 La. 766, 35 So. 896.

Md.—Thompson v. Williams, 100 Md. 195, 60 Atl. 26.

Mo.—White v. Gibson, 113 Mo. App. 568, 88 S. W. 120.

N. C.—Darden v. Skinner, 4 N. C. 259.

Pa.—Avery v. Street, 6 Watts, 247.

Va.—Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

Eng.—Twyne's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1.

Can.—Waddle v. McGinty, 15 Grant Ch. (U. C.) 261. The mere fact that personal property remains in the hands of the seller is not a fraud in itself, but only a matter for the consideration of the trial court, in deciding whether or not fraud exists. Fraser v. Murray, 34 N. S. (Can.) 186. See Retention of possession or apparent title, chap. XII, *infra*.

Retention of the management of certain lots, after a conveyance by a husband who was financially embarrassed to his wife in satisfaction of a debt due her, is not a badge of fraud, nor does it show that the conveyance was merely colorable, where the wife knew nothing concerning the business of selling lots. Dresser v. Zabrinkie (N. J. Ch.), 39 Atl. 1066.

as to make the facts consistent with the *bona fides* of the sale.⁷⁵

§ 12. **Reservation of trust or benefit for grantor.**—The reservation in a conveyance by one indebted at the time of some trust or benefit to himself at the expense of creditors, or by which creditors are prevented from compelling an immediate appropriation of the debtor's property to the payment of his debts, is generally a badge of fraud.⁷⁶

§ 13. **Relationship of parties.**—Relationship between the parties is not in itself a badge of fraud and fraud will not be implied therefrom. It is not sufficient in itself to establish want of good faith in a purchaser or mortgagee. But while not necessarily a badge of fraud, it is to be considered upon the question of intent and as a circumstance in deciding the question of the good faith of the parties.⁷⁷ Relationship may lessen the

75. *Teague v. Bass*, 131 Ala. 422, 31 So. 4.

76. *N. Y.*—*Young v. Heermans*, 66 N. Y. 374.

Me.—*Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663, a contract for the future support of the seller of the property, as part of the consideration for the sale, does not render the sale necessarily fraudulent as to creditors. It must also appear that he has not sufficient other property to pay his debts.

Mass.—*Pacific Nat. Bank v. Windram*, 133 Mass. 175, where a married woman settled an estate upon herself in trust, the conveyance containing a clause restricting the power of alienating the income by anticipation, a creditor's rights under an assignment of her right to future income by way of security for a loan are not restricted by the limitation of the trust.

N. H.—*Drew v. Rust*, 36 N. H. 335, a quitclaim deed, without consideration, from a mortgagor to the mortgagee, will be without effect, as against an attaching creditor of the mortgagor, and if a mortgagee, after such quitclaim deed, purchase the claim of a creditor, and cause the right in equity to be levied upon and sold, he cannot set up his quitclaim against the purchaser.

Eng.—*Twyne's Case*, 3 Coke, 80a, 1 Smith Lead. Cas. 1. See Reservations and trusts for grantors, chap. X, *infra*.

77. *N. Y.*—*DuBois v. Barker*, 4 Hun, 80, 6 Thomps. & C. 349.

U. S.—*Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16.

Ala.—*Moog v. Fraley*, 79 Ala. 246, conveyance to a brother.

Ill.—*Olipphant v. Liverridge (Ill.)*, 27 N. E. 921.

effect of the statements of the parties when other circumstances exist pointing to fraud.⁷⁸ Where a son of a decedent was practically insolvent, and his interest in the decedent's property had been exhausted by advancements made during the decedent's lifetime, the act of the decedent's daughters in conveying to an infant son of their insolvent brother their interest in a tract of land which descended to them from the decedent, was not fraudulent as against the creditors of their brother.⁷⁹

§ 14. **Indebtedness or insolvency of grantor.**—Mere indebtedness of the grantor at the time of making a voluntary conveyance of his property will not render the conveyance fraudulent and void as to his creditors.⁸⁰ But indebtedness on the part of the grantor at the time of the conveyance is a badge of fraud,⁸¹ and evidence of large indebtedness, or of complete insolvency, is

Ky.—*Williams v. Tye*, 19 Ky. L. Rep. 818, 42 S. W. 90, deed from father to daughter; *Mills v. Hunt*, 12 Ky. L. Rep. 866, 15 S. W. 518.

Mo.—*Martin v. Fox*, 40 Mo. App. 664.

Va.—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

Wis.—*Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 758. See Transactions between persons in confidential relations, chap. IX, *infra*.

78. *Oliphant v. Liverridge* (Ill.), 27 N. E. 921; *Mills v. Hunt*, 12 Ky. L. Rep. 866, 15 S. W. 518; *Martin v. Fox*, 40 Mo. App. 664.

79. *Hickey v. Davidson* (Iowa 1906), 105 N. W. 678.

80. *N. Y.*—*Spicer v. Ayers*, 53 How. Pr. 405; *Van Wyck v. Seward*, 6 Paige, 62.

Ga.—*Clayton v. Brown*, 17 Ga. 217.

Ill.—*Bittinger v. Kasten*, 111 Ill. 260.

Ind.—*Hubbs v. Bancroft*, 4 Ind. 388.

Md.—*Atkinson v. Phillips*, 1 Md. Ch. 507.

Mass.—*Thacher v. Phinney*, 89 Mass. 146; *Green v. Tanner*, 49 Mass. 411.

Minn.—*Filley v. Register*, 4 Minn. 391.

Miss.—*Cowen v. Alsop*, 51 Miss. 158.

Mo.—*Buckner v. Stine*, 48 Mo. 407; *Hickey v. Ryan*, 15 Mo. 63.

Pa.—*Mateer v. Hissim*, 3 Pen. & W. 160.

Tex.—*Willis v. Whitsitt*, 67 Tex. 673, 4 S. W. 253.

81. *U. S.*—*Hudgins v. Kemp*, 61 U. S. 45, 15 L. Ed. 853.

Ala.—*Harkins v. Bailey*, 48 Ala. 376.

Ind.—*Hubbs v. Bancroft*, 4 Ind. 388.

Miss.—*Edmonson v. Meacham*, 50 Miss. 34.

Tex.—*Reynolds v. Lansford*, 16 Tex. 286.

an important element in marshaling badges of fraud to overturn fraudulent conveyances and transfers.⁸² In a suit to set aside an alleged fraudulent conveyance, it is not necessary that the plaintiff allege or prove the debtor's insolvency at the time he executed the conveyance, though such fact is material as bearing on the purposes of the conveyance.⁸³

§ 15. **Absolute transfer intended as security.**—The giving of an absolute conveyance which is intended to operate only as a security, or putting in the form of a conveyance absolute on its face a transaction which is in fact a mortgage, is held to be a badge of fraud as to the creditors of the grantor or mortgagor,⁸⁴ and such a conveyance or transfer by a debtor is held by some of

82. *N. Y.*—*St. John Wood-Working Co. v. Smith*, 178 N. Y. 629, 71 N. E. 1139, *aff'd* 82 App. Div. 348, 82 N. Y. Supp. 1025.

U. S.—*McRea v. Mobile Branch Bank*, 19 How. 376, 15 L. Ed. 688.

Ark.—*Ringgold v. Waggoner*, 14 Ark. 69. *Compare* *Reeves v. Sherwood*, 45 Ark. 520; *Cox v. Fraley*, 26 Ark. 20.

Cal.—*Daugherty v. Daugherty*, 104 Cal. 221, 37 Pac. 889; *Purkitt v. Polack*, 17 Cal. 327.

Fla.—*Ballard v. Eckman*, 20 Fla. 661; *Barrow v. Bailey*, 5 Fla. 9.

Iowa.—*Glenn v. Glenn*, 17 Iowa, 498.

Ky.—*Bibb v. Baker*, 17 B. Mon. 292.

La.—*Dallas Brewery v. Holzner*, 116 La. 719, 41 So. 48.

Me.—*Blodgett v. Chaplin*, 48 Me. 322; *Hartshorn v. Eames*, 31 Me. 93.

Md.—*Applegarth v. Wagner*, 86 Md. 468, 38 Atl. 940; *Earnshaw v. Stewart*, 64 Md. 513, 2 Atl. 734; *Fuller v. Brewster*, 53 Md. 358.

Mo.—*State v. Merritt*, 70 Mo. 275.

Neb.—*Leffel v. Schemerhorn*, 13 Neb. 342, 14 N. W. 418.

N. C.—*Darden v. Skinner*, 4 N. C. 259.

Pa.—*Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717.

Tex.—*Stephens v. Allen* (Civ. App. 1895), 31 S. W. 314.

Va.—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

Eng.—*Grogan v. Cooke*, 2 Ball & B. 234; *Clements v. Eccles*, 11 Ir. Eq. 229; *Holmes v. Penny*, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; *Penhall v. Elwin*, 1 Smale & G. 258. See also *Indebtedness* or *insolvency of grantor*, chap. VI, *infra*.

83. *Crary v. Kurtz* (Iowa, 1906), 105 N. W. 590.

84. *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648; *Earnshaw v. Stewart*, 64 Md. 513, 2 Atl. 734; and cases cited in following note.

But see *Rigney v. Tallmadge*, 17 How. Pr. (N. Y.) 556, a conveyance of real estate absolute on its face, but in fact for the purpose of securing the grantee as a *bona fide* creditor, where the object is shown to be one which can be sustained, cannot be declared to be evidence of a fraudulent intent as to other creditors.

the authorities to be conclusively fraudulent as to existing creditors, although there may be no actual fraudulent intent.⁸⁵ Other cases hold that a conveyance or transfer absolute in terms, but given as security for a present debt or future advances, is not conclusively or as matter of law fraudulent as against creditors, and that the security may be enforced, if no fraud was in fact intended,⁸⁶ to the extent of the amount actually advanced.⁸⁷

§ 16. Concealment of or failure to record or file instrument.

—The mere withholding of a deed or mortgage from record

85. *Ala.*—Sims v. Gaines, 64 Ala. 392; Hartshorn v. Williams, 31 Ala. 149.

Cal.—Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493.

Conn.—Hough v. Ives, 1 Root, 492.

Ill.—Beidler v. Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

Iowa.—Fuller v. Griffith, 91 Iowa, 632, 60 N. W. 247.

Mo.—Pattison v. Letton, 56 Mo. App. 325.

N. H.—Watkins v. Arms, 64 N. H. 99, 6 Atl. 92; Stratton v. Putney, 63 N. H. 577, 4 Atl. 876; Badger v. Story, 16 N. H. 168.

N. J.—White v. McGill (Ch. 1899), 18 Atl. 355.

N. C.—Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Gulley v. Macy, 84 N. C. 434.

Vt.—Gibson v. Seymour, 4 Vt. 518.

86. *U. S.*—Chickering v. Hatch, 5 Fed. Cas. No. 2,672, 3 Sumn. 474; Gaffney v. Signaigo, 9 Fed. Cas. No. 5,169, 1 Dill. 158.

Ala.—Killough v. Steele, 1 Stew. & P. 262.

Ark.—Dowell v. Adler, 28 Ark. 82.

Colo.—McClure v. Smith, 14 Colo. 299, 23 Pac. 786; Ross v. Duggan, 5 Colo. 85.

Iowa.—Brown v. Bradford, *supra*;

Fuller v. Griffith, 91 Iowa, 632, 60 N. W. 247.

Kan.—First Nat. Bank v. Jaffray, 41 Kan. 694, 21 Pac. 242.

Me.—Emmons v. Bradley, 56 Me. 333; Stevens v. Hinckley, 43 Me. 440; Ulmer v. Hills, 8 Me. 326; Reed v. Jewett, 5 Me. 96.

Mass.—Harrison v. Phillips Academy, 12 Mass. 456.

Miss.—Bank of Mobile v. Tishomingo Sav. Inst., 62 Miss. 250.

N. D.—McCormick Harvesting Mach. Co. v. Citizens' Bank (1906), 106 N. W. 122.

Or.—Haseltine v. Espey, 13 Or. 301, 10 Pac. 423.

Vt.—Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264; Smith v. Onion, 19 Vt. 427.

Wash.—Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509.

Wis.—Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; McFarlane v. Loudon, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883. See also Reservations and trusts for grantor; absolute conveyance intended as security, chap. X, § 16, *infra*.

87. Joseph M. Smith Co. v. O'Brien, 57 N. J. Eq. 365, 41 Atl. 492.

does not render it fraudulent as to creditors, where no fraud is intended and no one is misled, or unless there is a fraudulent purpose to give the grantor or mortgagor a fictitious credit or he is thereby enabled to obtain a fictitious credit,⁸⁸ whether such withholding from record is the result of mere inattention, indifference, or agreement.⁸⁹ But the fact that the instrument of conveyance is withheld from record, or is concealed by fraudulent representations or otherwise, is generally held to be a badge of fraud.⁹⁰ The mere failure to record a conveyance, however, of itself, furnishes no ground for declaring it invalid. It is, at best, only a circumstance which may be considered, in connection with other proof of a preconceived purpose to deceive and de-

88. *Hardin v. Dolge*, 46 App. Div. (N. Y.) 416, 61 N. Y. Supp. 753; *National State Bank v. Sanford Fork, etc., Co.*, 157 Ind. 10, 60 N. E. 699; *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 684; *Jones v. Levering*, 116 Mo. App. 377, 91 S. W. 980. See also *Withholding instrument from record*, chap. XII, § 36, *infra*.

89. *Robertson & Co. v. Columbus Ins. & B. Co.*, 85 Miss. 234, 38 So. 100. An agreement not to record is a badge of fraud. *Clayton v. Exchange Bank*, 121 Fed. 630, 57 C. C. A. 656.

90. *N. Y.*—*St. John Wood-Working Co. v. Smith*, 178 N. Y. 629, 71 N. E. 1139, *aff'd* 82 App. Div. 348, 82 N. Y. Supp. 1025; *Guy v. Craighead*, 21 App. Div. 460, 47 N. Y. Supp. 576; *White v. Benjamin*, 3 Misc. Rep. 490; 23 N. Y. Supp. 981; *Talcott v. Levy*, 20 N. Y. Supp. 440, 29 Abb. N. C. 3; *United States Bank v. Housman*, 6 Paige, 526; *Hildreth v. Sands*, 2 Johns. Ch. 35. *Compare* *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed.

289; *Brown v. Easton*, 112 Fed. 592; *Thompson Nat. Bank v. Corwine*, 89 Fed. 774; *Dobson v. Snyder*, 70 Fed. 10; *Beecher v. Clark*, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256; *McLean v. Lafayette Bank*, 16 Fed. Cas. No. 8,888, 3 McLean, 587.

Ala.—*Crawford v. Kirksey*, 50 Ala. 590.

Colo.—*Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444.

Conn.—*Curtis v. Lewis*, 74 Conn. 367, 50 Atl. 878.

Ill.—*Hass v. Sternbach*, 156 Ill. 44, 41 N. E. 51; *McNeil, etc., Co. v. Plows*, 83 Ill. App. 186; *Blackman v. Preston*, 24 Ill. App. 237.

Iowa.—*Mull v. Dooley*, 89 Iowa, 312, 56 N. W. 513.

Kan.—*Wafer v. Harvey County Bank*, 46 Kan. 597, 26 Pac. 1032.

Ky.—*Hildeburn v. Brown*, 17 B. Mon. 779; *Scrivenor v. Scrivenor*, 7 B. Mon. 374.

Miss.—*Day v. Goodbar*, 69 Miss. 687, 12 So. 30; *Klein v. Richardson*, 64 Miss. 41, 8 So. 204.

Mo.—*Boone County Nat. Bank v. Newkirk*, 144 Mo. 472, 46 S. W. 606; *Gentry v. Field*, 143 Mo. 399, 45 S.

fraud; but as an independant, isolated fact, disconnected from other suspicious circumstances, it is insufficient to establish a fraudulent intent.⁹¹ Where it is either found that all the acts of the parties were done honestly and in good faith, or it is not found that they were dishonest or fraudulent, a deed or mortgage cannot be adjudged fraudulent and void on the ground that it was not recorded, and that in ignorance of the existence of the instrument assailed credit was given to the grantor upon the faith of his supposed ownership of the property.⁹² The fact that a person who gives a mortgage wishes it to be kept secret

W. 286; *Williams v. Kirk*, 68 Mo. App. 457.

N. J.—*Claffin v. Freudenthal*, 58 N. J. Eq. 298, 43 Atl. 529; *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244, 24 Atl. 928; *Thouren v. Pearson*, 29 N. J. Eq. 487.

N. C.—*Hafner v. Irwin*, 23 N. C. 490.

Ohio.—*Stewart v. Hopkins*, 30 Ohio St. 502.

Pa.—*Coates v. Gerlach*, 44 Pa. St. 43.

S. D.—*Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20.

Tex.—*Banner v. Robinson* (Civ. App. 1896), 34 S. W. 355.

Va.—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

Wis.—*Kickbusch v. Corwith*, 108 Wis. 634, 85 N. W. 148; *Standard Paper Co. v. Guenther*, 67 Wis. 101, 30 N. W. 298. *Compare* *McFarlane v. Loudon*, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

Eng.—*Hungerford v. Earle*, 2 Vern. Ch. 261, 23 Eng. Rep. 768.

91. *N. Y.*—*Delaney v. Valentine*, 154 N. Y. 692, 49 N. E. 65; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753.

U. S.—*Blennerhassett v. Sherman*,

105 U. S. 100, 26 L. Ed. 1080; *Curry v. McCauley*, 20 Fed. 583.

Fla.—*Pettit v. Coachman* (Fla. 1906), 41 So. 401.

Kan.—*First Nat. Bank v. Jaffray*, 41 Kan. 694, 21 Pac. 242.

Mass.—*Folsom v. Clemence*, 111 Mass. 273.

Miss.—*Day v. Goorbar*, 69 Miss. 687, 12 So. 30.

Mo.—*Wall v. Beedy*, 161 Mo. 623, 61 S. W. 864; *State v. O'Neill*, 151 Mo. 67, 52 S. W. 240; *First Nat. Bank v. Rohrer*, 138 Mo. 369, 39 S. W. 1047.

N. J.—*Asbury Park Bldg., etc., Assoc. v. Shepherd* (Ch. 1901), 50 Atl. 65; *Andrus v. Burke*, 61 N. J. Eq. 297, 48 Atl. 228.

S. C.—*McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86.

Wis.—*McFarlane v. Loudon*, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

Can.—*Bertrand v. Parkes*, 8 Manitoba, 175.

92. *State Bank v. Backus*, 160 Ind. 682, 67 N. E. 512. *Compare* *Green & Sons v. Weems*, 85 Miss. 566, 38 So. 551, as to effect of statute providing that a deed between husband and wife must be filed for record to be valid as against a third person.

for the sake of his credit does not of itself show fraud,⁹³ and the withholding of a deed from record merely to gratify the feelings of a proud debtor is not a fraudulent act.⁹⁴ But the withholding of a mortgage executed by a corporation from record until after it becomes insolvent, under an implied agreement, for the purpose of strengthening its credit while the directors test the success of the corporate business at the risk of future creditors, is fraudulent as against the creditors of the corporation.⁹⁵

§ 17. **Secrecy and haste.**—Secrecy,⁹⁶ and particularly an unusual degree of secrecy,⁹⁷ in a sale or conveyance by an insolvent debtor is generally held to be a badge of fraud and to throw suspicion on the transaction. But if a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent.⁹⁸ A pledge of securities may be, and

93. *Clark v. Watson*, 141 Mass. 248, 5 N. E. 298.

94. *Campbell v. Remaly*, 112 Mich. 214, 70 N. W. 432, 67 Am. St. Rep. 493; *Claffin v. Freudenthal*, 58 N. J. Eq. 298, 43 Atl. 529; *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244, 24 Atl. 928.

95. *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622.

96. *U. S.*—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Warner v. Norton*, 20 How. 448, 15 L. Ed. 950; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107.

Cal.—*Daugherty v. Daugherty*, 104 Cal. 221, 37 Pac. 889.

Conn.—*New Haven Steamboat, etc., Co. v. Vanderbilt*, 16 Conn. 420.

Iowa.—*Stewart v. Mills County Nat. Bank*, 76 Iowa, 571, 41 N. W. 318. *Compare* *Nicholas v. Higby*, 35 Iowa, 401.

Ky.—*Herrin v. Munford*, 9 Dana, 450.

Mass.—*Folsom v. Clemence*, 111

Mass. 273, the secrecy is matter for the jury to consider; *Gould v. Ward*, 4 Pick. 104.

N. C.—*Peebles v. Horton*, 64 N. C. 374; *Darden v. Skinner*, 4 N. C. 259.

Pa.—*Avery v. Street*, 6 Watts, 247.

Va.—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

Eng.—*Twyne's Case*, 3 Coke, 80a, 1 Smith Lead. Cas. 1. *Compare* *Negele v. First Nat. Bank*, 129 Ill. 157, 21 N. E. 812, 16 Am. St. Rep. 257, *aff'd* 28 Ill. App. 112; *Fortner v. Whelan*, 87 Wis. 88, 58 N. W. 253; *Peninsula Stove Co. v. Sacket*, 74 Wis. 526, 43 N. W. 491. See also *Secrecy and haste in giving preferences*, chap. XI, § 24, *infra*.

97. *Fishel v. Lockhard*, 52 Ga. 632; *Filley v. Register*, 4 Minn. 391, 77 Am. Dec. 522.

98. *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243.

usually is, done in secrecy,⁹⁹ and the fact that such a transfer is kept secret until after a general assignment by the debtor may be strong evidence of a fraudulent intent or purpose, yet if all the parties to the transfer believed when it was made that the debtor was solvent, and there was no one, to whom he was under obligations to reveal the transfer, who was injured by the secrecy, and publication of it would have precipitated a failure which was then believed to be avoidable, the secrecy observed was not the subject of criticism.¹ Secrecy is a circumstance which may give force to other evidence,² and from which in connection with other circumstantial evidence fraud may be established.³ Undue or unusual haste in consummating a sale or transfer of his property by a debtor is, as a rule, held to be a badge of fraud,⁴ sufficient to throw the burden of proving the good faith of the transaction on the grantor.⁵

99. *Stackhouse v. Holden*, 66 App. Div. (N. Y.) 423, 73 N. Y. Supp. 203.

1. *National Hudson River Bank v. Davison*, 28 App. Div. (N. Y.) 311, 51 N. Y. Supp. 64.

2. *U. S.*—*Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Neslin v. Wells*, 104 U. S. 428, 26 L. Ed. 802.

Ky.—*Hildeburn v. Brown*, 17 B. Mon. 779.

Md.—*Gill v. Griffith*, 2 Md. Ch. 270.

Miss.—*Hilliard v. Cagle*, 46 Miss. 309.

N. H.—*Haven v. Richardson*, 5 N. H. 113.

N. J.—*Thouren v. Pearson*, 29 N. J. Eq. 487.

N. C.—*Hafner v. Irwin*, 23 N. C. 490.

W. Va.—*Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74; *Reynolds v. Gawthrop*, 37 W. Va. 3, 16 S. E. 364.

Eng.—*Worseley v. De Mattos*, 1 Burr. 467, 2 Ld. Ken. 218; *Griffin v.*

Stanhope, Cro. Jac. 454; *Corlett v. Radcliff*, 14 Moore P. C. 121, 4 L. T. Rep. N. S. 1, 15 Eng. Reprint, 251; *Leonard v. Baker*, 1 M. & S. 251.

3. *Wiggington v. Winter*, 28 Ky. L. Rep. 79; *Dobson v. Snyder*, 70 Fed. 10; *Ross v. Crutsinger*, 7 Mo. 245.

4. *U. S.*—*Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107.

Ala.—*Schaungut v. Udell*, 93 Ala. 302, 9 So. 550; *Carter v. Coleman*, 84 Ala. 256, 4 So. 151; *Hodges v. Coleman*, 76 Ala. 103.

Ark.—*Adler-Goldman Commission Co. v. Hathcock*, 55 Ark. 579, 18 S. W. 1048.

Mich.—*Bendetson v. Moody*, 100 Mich. 553, 59 N. W. 252.

Mo.—*St. Louis Brewing Assoc. v. Steimke*, 68 Mo. App. 52.

N. J.—*Kimmouth v. White* (Ch. 1900), 47 Atl. 1.

Eng.—*Herne v. Meeres*, 1 Vern. Ch. 465, 23 Eng. Reprint, 591.

5. *Hetterman Bros. Co. v. Young* (Tenn. Ch. App. 1898), 52 S. W. 532.

§ 18. **Sales on credit.**—The mere fact that goods or other property are sold by a debtor on credit does not render the sale fraudulent as to creditors or require that the transaction should be declared invalid. There is no legal presumption of fraud from a sale on credit.⁶ The sale of all the effects of an insolvent or embarrassed debtor, upon credit, at a fair valuation to a responsible purchaser, although made by the vendor with intent to hinder, delay, and defraud his creditors, and although the purchaser knew of the insolvency, is not voidable unless the purchaser knew of the fraudulent intent.⁷ But the fact that a sale of all or a portion of his property by an insolvent debtor was made on credit is a circumstance to be considered with other evidence by the jury in determining the question of fraud as bearing upon the question of fraudulent intent.⁸ The sale of a debtor's property made upon an unusually long term of credit has a tendency to delay and hinder creditors by interposing a legal title between them and the debtor, and consequently is held to be a badge of fraud.⁹ The

6. N. Y.—*Matthews v. Rice*, 31 N. Y. 457; *Evans v. Sims*, 82 Hun, 396, 31 N. Y. Supp. 259.

Ala.—*Lienkauf v. Morris*, 66 Ala. 406; *Andrews v. Jones*, 10 Ala. 400.

Ga.—*Nicoll v. Crittenden*, 55 Ga. 497.

Ill.—*Nelson v. Smith*, 28 Ill. 495.

Iowa.—*Ray v. Teabout*, 65 Iowa, 157, 21 N. W. 497; *Hughes v. Monty*, 24 Iowa, 499.

Mich.—*Lewis v. Rice*, 61 Mich. 97, 27 N. W. 867.

Mo.—*John Deere Plow Co. v. Sullivan*, 158 Mo. 440, 59 S. W. 1005, the fact that the vendee gave a note payable in two years is not a badge of fraud; *Adam Roth Grocery Co. v. Lewis*, 69 Mo. App. 463. *Compare* *Seger v. Thomas*, 107 Mo. 635, 18 S. W. 33, a sale of goods to a creditor, where they exceeded in value the amount of his debt, and the sale as to the excess was on credit, is void.

N. C.—*Beasley v. Bray*, 98 N. C. 266, 3 S. E. 497.

Tenn.—*McCasland v. Carson*, 1 Head, 117, a sale of lands on credit of one, two and three years is not fraudulent in law; *Harper v. Trent* (Ch. App. 1899), 53 S. W. 245.

But *compare* *Elser v. Graber*, 69 Tex. 222, 6 S. W. 560; *Blum v. McBride*, 69 Tex. 60, 5 S. W. 641, where a sale of land on credit was held void.

7. Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522, *rev'd* 4 Daly, 45; *Loeschigk v. Bridge*, 42 N. Y. 421.

8. Roberts v. Shepard, 2 Daly (N. Y.), 110; *Hughes v. Monty*, 24 Iowa, 499; *Smead v. Williamson*, 16 B. Mon. (Ky.) 492; *Tillman v. Heller* (Tex. 1890), 14 S. W. 271.

9. Ala.—*Borland v. Walker*, 7 Ala. 269.

Ill.—*Cowling v. Estes*, 15 Ill. App. 255.

transfer by an embarrassed debtor of his property on a long credit to an irresponsible purchaser, taking his notes without security, has been held to be a badge of fraud.¹⁰ But the fact that the vendee is an infant, and purchased partly on credit from a firm in straightened circumstances, does not render the sale void in law as against creditors of the firm.¹¹ And it has been held that long credit, failure to take security, great value, and present inability of the purchaser to pay are not so necessarily badges of fraud in a sale as that the court should so designate them in charging the jury without any direct request to do so.¹²

§ 19. Transactions not in usual course of business.—The fact that the sale or mortgage of his property by an insolvent debtor was made out of business hours or otherwise out of the usual course of business, or in an unusual mode, has been held to be a badge of fraud, or a circumstance indicative of fraud.¹³ By

Iowa.—Spaulding v. Adams, 63 Iowa, 437, 19 N. W. 341.

Kan.—Roberts v. Radcliff, 35 Kan. 502, 11 Pac. 406.

Miss.—Pope v. Andrews, Sm. & M. Ch. 135.

Tex.—Jacobs v. Totty, 76 Tex. 343, 13 S. W. 372, indefinite credit.

Va.—Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

10. Litchfield v. Pelton, 6 Barb. (N. Y.) 187; Glenn v. Glenn, 17 Iowa, 498; Fulkerson v. Sappington, 104 Mo. 472, 15 S. W. 941; Robinson v. Frankel, 85 Tenn. 475, 3 S. W. 652; Hickman v. Trout, *supra*.

11. Matthews v. Rice, 31 N. Y. 457.

12. Nicol v. Crittenden, 55 Ga. 497.

13. *N. Y.*—Wick v. Kunzeman, 30 Misc. Rep. 457, 62 N. Y. Supp. 537, sale of stock of merchandise by an employer to an employee, who was without apparent means, at midnight for one thousand four hundred dollars.

U. S.—Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489, sudden sale by country merchant of entire stock; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Judson v. Courier Co., 15 Fed. 541, sale held *prima facie* fraudulent; Nisbet v. Quinn, 7 Fed. 760, sale held *prima facie* fraudulent under Rev. St., §§ 5129, 5130.

Ala.—Hodges v. Coleman, 76 Ala. 103, sale of stock of goods at night.

Ga.—Hoffer v. Gladden, sale in unusual mode of entire stock.

La.—Emswiler v. Burham, 6 La. Ann. 710. Compare Hirsch v. Fudicker, 43 La. Ann. 886, 9 So. 742.

Mass.—Killam v. Pierce, 153 Mass. 502, 27 N. E. 520, sale of stock of goods late at night.

Mich.—Bendetson v. Moody, 100 Mich. 553, 59 N. W. 252, sale of stock of goods at night.

Mo.—State v. Merritt, 70 Mo. 275.

R. I.—Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510, conveyance made secretly and at night.

express statutory provision in some states, the fact that a sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor is *prima facie* evidence of fraud.¹⁴ Whether a transaction was in the usual and ordinary course of business is usually a question of fact,¹⁵ but it may be a question of law under some circumstances.¹⁶ The former federal bankruptcy act declared *prima facie* fraudulent sales, assignments, transfers, or conveyances not made in the usual and ordinary course of business of the debtor, and this provision was construed and applied in many cases cited in the note below.¹⁷

Vt.—*Read v. Moody*, 60 *Vt.* 668, 15 *Atl.* 345, where defendant's son called on him at an early hour in the morning and handed him certain notes, without any explanation or direction as to their use, simply saying that he had sold out and was going away, the transfer was not in the usual course of business and consequently presumptively fraudulent.

Can.—*Upper Canada Bank v. Beatty*, 9 *Grant Ch.* 321.

Compare *Reeves v. John*, 95 *Tenn.* 434, 32 *S. W.* 312, where the conveyance was made to secure *bona fide* debts.

14. *Bliss v. Crosier*, 159 *Mass.* 498, 34 *N. E.* 1075; *Killam v. Pierce*, 153 *Mass.* 520, 27 *N. E.* 520; *Nary v. Merrill*, 8 *Allen (Mass.)*, 451; *Read v. Moody*, 60 *Vt.* 668, 15 *Atl.* 345, it must appear that the transaction was not according to the usual and ordinary course of business of the particular person whose conveyance is in question.

15. *Bliss v. Crosier*, *supra*; *Leighton v. Morrill*, 159 *Mass.* 271, 34 *N. E.* 256; *Killam v. Pierce*, *supra*; *Peabody v. Knapp*, 153 *Mass.* 242, 26 *N. E.* 696; *Bridges v. Miles*, 152 *Mass.* 249, 25 *N. E.* 249; *Stevens v. Pierce*,

147 *Mass.* 510, 18 *N. E.* 411; *Buffum v. Jones*, 144 *Mass.* 29, 10 *N. E.* 471; *Alden v. Marsh*, 97 *Mass.* 160; *State v. Merritt*, 70 *Mo.* 275.

16. *Walbrun v. Babbitt*, 16 *Wall. (U. S.)* 577, 21 *L. Ed.* 489; *Nary v. Merrill*, 8 *Allen (Mass.)* 451.

17. *Walbrun v. Babbitt*, *supra*; *Judson v. Courier Co.*, 15 *Fed.* 541; *Nisbet v. Quinn*, 7 *Fed.* 760; *Norton v. Billings*, 4 *Fed.* 623; *Brooks v. Davis*, 4 *Fed. Cas. No.* 1,950; *Davis v. Armstrong*, 7 *Fed. Cas. No.* 3,624; *Graham v. Stark*, 10 *Fed. Cas. No.* 5,676, 3 *Ben.* 520; *In re Hunt*, 12 *Fed. Cas. No.* 6,881; *Hurley v. Smith*, 12 *Fed. Cas. No.* 6,920, 1 *Hask.* 308; *Judson v. Kelty*, 14 *Fed. Cas. No.* 7,567, 5 *Ben.* 348; *In re Kahley*, 14 *Fed. Cas. No.* 7,593, 2 *Biss.* 383; *Main v. Glen*, 16 *Fed. Cas. No.* 8,973, 7 *Biss.* 86; *Moore v. Young*, 17 *Fed. Cas. No.* 9,782, 4 *Biss.* 128; *North v. House*, 18 *Fed. Cas. No.* 10,310; *Rison v. Knapp*, 20 *Fed. Cas. No.* 11,861, 1 *Dill.* 187; *Schrenkeisen v. Miller*, 21 *Fed. Cas. No.* 12,480, 9 *Ben.* 55; *Webb v. Sachs*, 29 *Fed. Cas. No.* 17,325, 4 *Sawy.* 158; *Wilson v. Stoddard*, 30 *Fed. Cas. No.* 17,838; *Ecker v. McAllister*, 45 *Md.* 290, 54 *Md.* 362; *Otis v. Hadley*, 112 *Mass.* 100.

§ 20. **Other circumstances indicating fraud.**—Various other circumstances have been held by the courts to be indicative of fraud as against creditors, such as the failure of the purchaser to take an inventory, invoice, or appraisal of the goods bought;¹⁸ or to examine them;¹⁹ insufficient description or misdescription of the property transferred;²⁰ concealment of an alteration in the attestation of the conveyance;²¹ a demand that two-thirds of the price should at once be paid in cash;²² payment by check which was afterwards taken up by giving money and a note;²³ a transaction in the form of a cash sale of real estate, followed a few days later by the payment of an unsecured note due by the vendor to the vendee;²⁴ the fact that the notes given are made payable to a relative of the grantor living in a distant state;²⁵ the fact that the purchaser offered soon after the sale to resell the property bought at a much less price;²⁶ the fact that the grantee was the

18. *Chamberlain v. Dorrance*, 69 Ala. 40; *Adler-Goldman Commission Co. v. Hathcock*, 55 Ark. 579, 18 S. W. 1048; *J. S. Brittain Dry Goods Co. v. Plowman*, 113 Iowa, 624, 85 N. W. 810; *Kolander v. Dunn*, 95 Minn. 422, 104 N. W. 371, 483, the statute providing that a sale of a stock of merchandise in gross will be deemed fraudulent as to creditors, unless an inventory is made and notice given, does not apply to a sale of fixtures; *Irwin Phillips & Co. v. Rule* (Mo. App. 1907), 102 S. W. 32; *St. Louis Brewing Assoc. v. Steimke*, 68 Mo. App. 52; *Rusho v. Richardson* (Neb. 1906), 109 N. W. 394; *Blum v. Simpson*, 66 Tex. 84, 17 S. W. 402. But see *Nelson v. Smith*, 28 Ill. 495.

19. *Schaungut v. Udell*, 93 Ala. 302, 9 So. 550.

20. *Rodenberg v. H. B. Claffin Co.* 104 Ala. 560, 16 So. 448, a bill of sale; *H. B. Claffin & Co. v. Rodenberg*, 101 Ala. 213, 13 So. 272; *Duvall v. Waters*, 1 Bland (Md.), 569,

18 Am. Dec. 350, conveyance of land, plantation utensils, furniture, etc.; *Lang v. Lee*, 3 Rand. (Va.) 410. Compare *Jones v. Sleeper*, 13 Fed. Cas. No. 7,496; *McCain v. Wood*, 4 Ala. 258; *Carr v. Brigg*, 156 Mass. 78, 30 N. E. 470, where the property in a chattel mortgage given by a firm was not described as the property of the firm the mortgage is good as against subsequent attaching creditors; *Judge v. Houston*, 34 N. C. 108, the fact that a deed includes more land than was sold is not a badge of fraud.

21. *Hoffer v. Gladden*, 75 Ga. 532.

22. *Adler-Goldman Commission Co. v. Hathcock*, 55 Ark. 579, 18 S. W. 1048.

23. *Schaungut v. Udell*, 93 Ala. 302, 9 So. 550.

24. *New Orleans Acid, etc., Co. v. O. Guillory & Co.* (La. 1906), 42 So. 329.

25. *Blum v. Simpson*, 66 Tex. 84, 17 S. W. 402.

26. *Hodges v. Coleman*, 76 Ala. 103.

grantor's mother and a non-resident;²⁷ the fact that the conveyance was so made as to concentrate the property in the debtor's two sons-in-law, who had no use for the property and never applied it to their personal use;²⁸ the fact that but little, if any, of the property transferred had been assessed for taxes against the vendee;²⁹ the fact that notes had not been actually executed at the time of the making of a mortgage to secure them, but were made subsequently so as to correspond with the mortgage;³⁰ the fact that the grantor in a conveyance delivers the same to the recorder for the purpose of having such deed recorded;³¹ and the fact that a grantor keeps his other property inaccessible to his creditors.³² On the contrary, an erroneous recital of what a part of the consideration for the conveyance consisted of has been held not to be a badge of fraud,³³ and the employment of the vendor on a salary by the vendee is held not to be necessarily evidence of fraud in a transfer.³⁴ An agreement between a debtor and a creditor that the former will give the latter a mortgage when demanded to secure his indebtedness,³⁵ or the fact that an attorney who thinks he knows the title, having confidence in the vendor, purchases real property without an abstract or examination of title,³⁶ does not indicate fraud as to creditors. And where a creditor, to whom property is conveyed in payment of a *bona fide* debt, about a year after the

27. Behan v. Warfield, 90 Ky. 151, 11 Ky. L. Rep. 960, 13 S. W. 439.

28. Herrin v. Morford, 9 Dana (Ky.) 450.

29. Glenn v. Glenn, 17 Iowa, 498.

30. Prior v. White, 12 Ill. 261.

31. Ward v. Wehman, 27 Iowa, 279. Compare Mason v. Franklin, 58 Iowa, 506, 12 N. W. 554.

32. Cohen v. Parish, 100 Ga. 335, 28 S. E. 122.

33. Strop v. Hughes (Mo. App. 1907), 101 S. W. 146, 149.

34. McKenzie v. Thomas, 118 Ga. 728, 45 S. E. 610; Reed v. Wilson, 22 Ill. 377, 74 Am. Dec. 159; Brown v. Riley, 22 Ill. 45; Pease v. Dawson,

97 Ill. App. 620; Blakely Printing Co. v. Pease, 95 Ill. App. 341; McCord v. Gilbert, 64 Ill. App. 233; Jones v. Whitbread, 11 C. B. 406, 15 Jur. 612, 20 L. J. C. P. 217, 73 E. C. L. 406.

Whether the vendee's employment of a clerk of the vendor is a badge of fraud depends upon the circumstances of the case. Ivancovich v. Stern, 14 Nev. 341. See also Faunce v. Lesley, 6 Pa. St. 121.

35. Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107. See also Groetinger v. Wyman, 105 Iowa, 574, 75 N. W. 512.

36. Jenkins v. Einstein, 14 Fed. Cas. No. 7,265, 3 Biss. 128.

conveyance demands, as a condition of selling such property to an unsecured creditor, that he be reimbursed for expenses incident to the transfer, including a loan later made to the debtor, and attorney's fees necessitated by proceedings brought by the unsecured creditor in relation to the property so conveyed, it does not indicate that the original conveyance was fraudulent.³⁷ But, as is shown elsewhere,³⁸ fraud as against creditors in the sale of property must be clearly and distinctly proved, and cannot be assumed on doubtful evidence or circumstances of suspicion, or from the fact that the dealing was not perfectly clear.³⁹

§ 21. **Repelling badges of fraud.**—Signs or badges of fraud as against creditors in a conveyance or transfer of property by a debtor are repelled by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent than if such badges of fraud did not exist.⁴⁰ Where numerous signs or badges of fraud exist it is incumbent on the party seeking to uphold the transfer to meet and overcome them.⁴¹

37. *O'Connor v. Docen*, 50 App. Div. (N. Y.) 610, 64 N. Y. Supp. 206.

38. See Evidence, chap. XVII, *infra*.

39. *Harrisonburg Harness Co. v.*

National Furniture Co. (Va. 1906), 55 S. E. 679.

40. *Shealy v. Edwards*, 75 Ala. 411; *Terrell v. Green*, 11 Ala. 207.

41. *Trice v. Rose*, 79 Ga. 75, 3 S. E. 701.

CHAPTER VII.

INDEBTEDNESS OR INSOLVENCY OF GRANTOR.

- Section 1.** Effect of indebtedness of grantor upon conveyances for valuable consideration.
2. Effect of indebtedness of grantor upon voluntary conveyances.
 3. What constitutes indebtedness.
 4. Payment or provision for payment of debts by grantor.
 5. Assumption and payment of debts by grantor.
 6. Effect of insolvency of grantor upon conveyances for valuable consideration.
 7. Effect of insolvency of grantor upon voluntary conveyances.
 8. What constitutes insolvency.
 9. Retention of property sufficient to pay debts.
 10. Effect of insolvency subsequent to transfer.
 11. Executory contract or gift consummated after insolvency.
 12. Insolvency at time suit is brought.

Section 1. Effect of indebtedness of grantor upon conveyance for valuable consideration.—Where a transfer of property is made for a valuable consideration, it will not be presumed to be fraudulent as to creditors from the mere fact that the grantor was indebted to another person at the time.¹ A person, though in debt, may sell his property to any one he pleases, for an honest and fair consideration. If the transaction is an honest one, made in good faith, and for an adequate consideration, it matters not how many creditors may be prevented thereby from reaching the property.² The fact that the grantor was in debt will not of

1. *Mercantile Exch. Bank v. Taylor* (Fla. 1906), 41 So. 22; *Nelson v. Smith*, 28 Ill. 495; *Waddams v. Humphrey*, 22 Ill. 661; *Faringer v. Ramsay*, 4 Md. Ch. 33; *Missouri Lead Min., etc., Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488; *Willis v. Whitsitt*, 67 Tex. 673, 4 S. W. 253.

2. *Hessing v. McCloskey*, 37 Ill.

341; *Arundell v. Phipps*, 10 Ves. Jr. 139, 32 Eng. Reprint, 797, a purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against creditors, if *bona fide*, although the husband is indebted at the time; and even though the object is to preserve from his creditors for the family the

itself invalidate the sale, although the purchaser may have known that fact at the time of purchasing.³ Where all the circumstances surrounding the sale of the property of one corporation to another show that the transfer was made in good faith, the failure to provide for the payment of a contested claim does not warrant the conclusion that such transfer was made to defraud creditors.⁴ Neither the pecuniary embarrassment nor the actual insolvency of a husband is any obstacle to a transfer by a husband to the wife, in good faith, for the replacing of her money or property used or alienated by him.⁵ In case of an absolute and unconditional sale of goods, the fact that the vendor was indebted at the time, that the sale was on credit, and that the notes taken for the unpaid price were to be used in the payment of his debts, will not establish fraud in the sale, as to creditors.⁶ But a conveyance of personal property, by a debtor in embarrassed circumstances, for the purpose, known to the purchaser, of securing the same from execution or attachment, is void as against creditors, although the debtor, at the time, believed that such conveyance was for the benefit of his creditors, and intended that his creditors should ultimately be paid.⁷

§ 2. **Effect of indebtedness of grantor upon voluntary conveyance.**—A voluntary conveyance by one indebted at the time is presumptively or *prima facie* fraudulent.⁸ Indebtedness on

subject of the purchase, such as ancient family pictures, furniture and other articles, of a peculiar nature and value.

3. *Davis v. Getchell*, 32 Neb. 792, 49 N. W. 776.

4. *Missouri Lead Min., etc., Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 215 W. 488.

5. *Lehman v. Levy*, 30 La. Ann. 745; *Hume & W. Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59, a husband may return his wife a loan of money augmented by a portion of

the profits of a business conducted by him, if he retains an amount of tangible property largely in excess of his just indebtedness.

6. *Miller v. Kirby*, 74 Ill. 242.

7. *Hall v. Frith*, 51 Misc. Rep. (N. Y.) 600, 101 N. Y. Supp. 31; *Kimball v. Thompson*, 4 Cush. (Mass.) 441, 50 Am. Dec. 799.

8. *N. Y.*—*Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Lawrence Bros. v. Heylman*, 98 N. Y. Supp. 121; *Cole v. Tyler*, 65 N. Y. 78; *Dunlap v. Hawkins*, 59 N. Y. 346; *Erickson v. Quinn*, 47 N. Y. 410; *Seward v. Jackson*, 8

the part of the grantor at the time of the conveyance is evidence of fraud.⁹ But mere indebtedness of the grantor at the time of making a voluntary conveyance will not render it fraudulent as to creditors.¹⁰ The question of fraud is to be ascertained from

Cow. 406. In *Cole v. Tyler*, 65 N. Y. 73, 78, the court say: "It was at one time the rule that a voluntary conveyance by one indebted at the time was fraudulent as a matter of law towards his creditors. No evidence was allowed to rebut the presumption of fraud. *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520. This rule was subsequently deemed to be too severe by the courts, and the less stringent rule was adopted that while a conveyance by a person indebted was presumptively or *prima facie* fraudulent, the presumption might be rebutted by proof to the contrary. *Seward v. Jackson*, 8 Cow. 406. This presumption, however, is not to be overthrown by mere evidence of good intent or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision and that the debtor still retained sufficient means to pay his debts. He can no more delay his creditors by such voluntary conveyance than he can actually defraud them. *Carpenter v. Roe*, 10 N. Y. 230; *Babcock v. Eckler*, 24 N. Y. 623; *Dygart v. Remerschnider*, 32 N. Y. 648; *Curtis v. Fox*, 47 N. Y. 300."

U. S.—*Gilmore v. North America Land Co.*, 10 Fed. Cas. No. 5,448, Pet. C. C. 460.

Ala.—*Hubbard v. Allen*, 59 Ala. 283.

Md.—*Goodman v. Wineland*, 61 Md. 449.

Mo.—*Patten v. Casey*, 57 Mo. 118.

Va.—*Wilson v. Buchanan*, 7 Gratt. (Va.) 334.

Eng.—*Scarfe v. Soulby*, 19 L. J. Ch. 30, 13 Jur. 1109, 1 Hall & T. 426, 1 Macn. & G. 364, 47 Eng. Ch. 293, 41 Eng. Reprint, 1306.

9. U. S.—*Hudgins v. Kemp*, 61 U. S. 45, 15 L. Ed. 853.

Ala.—*Harkins v. Bailey*, 48 Ala. 376.

Ind.—*Geisendorff v. Eagles*, 106 Ind. 38, 5 N. E. 743; *Hubbs v. Bancroft*, 4 Ind. 388.

Me.—*French v. Holmes*, 67 Me. 186.

Md.—*Worthington v. Bullitt*, 6 Md. 172.

Miss.—*Edmonson v. Meacham*, 50 Miss. 34.

Mo.—*Woodson v. Pool*, 19 Mo. 340; *Hastings v. Crossland*, 13 Mo. App. 592.

S. C.—*Gruber v. Boyles*, 1 Brew. 266, 2 Am. Dec. 665.

Tex.—*Reynolds v. Lansford*, 16 Tex. 286.

W. Va.—*Hume & W. Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56.

10. N. Y.—*Wadleigh v. Wadleigh*, 111 App. Div. 367, 97 N. Y. Supp. 1063; *Spicer v. Ayers*, 53 How. Pr. 405; *Van Wyck v. Seward*, 6 Paige, 62.

Ga.—*Clayton v. Brown*, 17 Ga. 217.

Ill.—*Bittinger v. Kasten*, 111 Ill. 260.

Ind.—*Hubbs v. Bancroft*, 4 Ind. 388; *Ritchey v. McKay* (App. 1905), 75 N. E. 161, an intent to defraud creditors is no ground for setting aside a conveyance where the grantor was solvent.

all the circumstances of the case, and not alone from the mere fact of indebtedness at the time.¹¹ The existence of indebtedness at the time is only *prima facie* evidence of fraud.¹² A voluntary conveyance, executed by a person largely indebted at the time, is void as against creditors.¹³ A trifling indebtedness will not avoid a conveyance for fraud.¹⁴ Where a debtor makes a gift of such an amount of his property as leaves him without sufficient property to pay his debts or as must necessarily hinder, delay or defraud his creditors, in legal contemplation, he intends to defraud, as he deliberately does an act which hinders his creditors.¹⁵ But intentional fraud must appear and the prior indebtedness is but evidence of fraud, and may be rebutted by proof.¹⁶ Fraudulent intent is not sufficiently proved by showing large indebtedness, without also showing inability to discharge it.¹⁷ A voluntary conveyance by a debtor, who, although not in-

Md.—Atkinson v. Phillips, 1 Md. Ch. 507.

Mass.—Thacher v. Phinney, 80 Mass. 146; Green v. Tanner, 49 Mass. 411.

Minn.—Filley v. Register, 4 Minn. 391.

Miss.—Cowen v. Alsop, 51 Miss. 158.

Mo.—Welch v. Mann, 193 Mo. 304, 92 S. W. 98, if after the conveyance he still has ample means to pay his debts; Buckner v. Stine, 48 Mo. 407; Hickey v. Ryan, 15 Mo. 63.

Pa.—Mateer v. Hissim, 3 Pen. & W. 160.

11. Atkinson v. Phillips, 1 Md. Ch. 507.

12. Neal v. Foster, 36 Fed. 29; Driggs & Co.'s Bank v. Norwood, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323; Williams v. Banks, 11 Md. 198; Baxter v. Sewell, 3 Md. 334; Sewell v. Baxter, 2 Md. Ch. 447; Worthington v. Shipley, 5 Gill. (Md.) 449; Walsh v. Byrnes (Minn.), 40 N. W. 831.

13. *Ky.*—Marcum v. Powers, 10 Ky. L. Rep. 380, 9 S. W. 255; Hall v. Edrington, 47 Ky. 47.

Md.—Worthington v. Bullitt, 6 Md. 172.

Mo.—Bohannon v. Combs, 79 Mo. 305.

S. C.—Hudnal v. Wilder, 4 McCord, 294, 17 Am. Dec. 744; Iley v. Niswanger, 1 McCord Eq. 518.

14. *N. Y.*—Jackson v. Peek, 4 Wend. 300.

Mich.—Page v. Kendrick, 10 Mich. 300.

S. C.—Richardson v. Rhodus, 14 Rich. L. 95; Hudnal v. Teasdale, 1 McCord, 227, 10 Am. Dec. 671.

Va.—Irvine v. Greever, 32 Gratt. 411.

15. Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240; Gardiner Sav. Inst. v. Emerson, 91 Me. 535, 40 Atl. 451.

16. Wicks v. Clarke, 3 Edw. Ch. (N. Y.) 58.

17. Loeschigk v. Hatfield, 28 N. Y. Super. Ct. 26, *aff'd* 51 N. Y. 660.

solvent or so much involved as to render the residue of his estate insufficient to pay his debts, is involved to an extent which might in view of ordinary contingencies endanger the rights of his creditors, is constructively fraudulent both as to pre-existing and subsequent creditors.¹⁸ To render a voluntary conveyance fraudulent and void as to creditors because of indebtedness, it must be shown that the grantor was heavily indebted at the time,¹⁹ or to such an extent that the conveyance had a direct tendency to impair the rights of creditors.²⁰ Only clear solvency in the sense of adequacy of assets, if sold under execution to satisfy debts, will uphold a voluntary conveyance, as against pre-existing debts.²¹

§ 3. **What constitutes indebtedness.**—A party bound by a contract upon which he may become liable for the payment of money, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors, although his liability be contingent.²² The undertaking of an endorser of a note is

18. *Crary v. Kurtz* (Iowa, 1905), 105 N. W. 590; *Lowry v. Fisher*, 2 Bush. (Ky.) 70, 92 Am. Dec. 475; *Parkman v. Welch*, 36 Mass. 231; *Nelson v. Buchanan*, 7 Gratt. (Va.) 334.

19. *Kehr v. Smith*, 87 U. S. 31, 22 L. Ed. 313.

20. *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Patrick v. Patrick*, 77 Ill. 555; *Brice v. Myers*, 5 Ohio, 121.

As to subsequent creditor.—Defendant's conveyance of property to a relative, made before he became indebted to plaintiff, and with plaintiff's knowledge, at a time when there is no proof showing defendant was insolvent, could not be fraudulent as to plaintiff. *Lowther v. Rader*, 102 N. Y. Supp. 929.

21. *Vandeventer v. Goss*, 116 Mo. App. 316, 91 S. W. 958.

22. *N. Y.*—*Young v. Heermans*, 66 N. Y. 374; *Van Wyck v. Seward*, 18 Wend. 375.

U. S.—*Thompson v. Crane*, 73 Fed. 327.

Ala.—*Wooten v. Steele*, 109 Ala. 563, 19 So. 972; *Yeend v. Weeks*, 104 Ala. 331, 16 So. 165.

Miss.—*Ames v. Dorroh*, 76 Miss. 187, 23 So. 768.

Mo.—*Welch v. Mann*, 193 Mo. 304, 92 S. W. 98, the indebtedness accrues when the contingent liability is incurred.

N. J.—*Schmidt v. Opie*, 33 N. J. Eq. 138; *Post v. Stiger*, 29 N. J. Eq. 554.

Ohio.—*Jones v. Leeds*, 7 Ohio N. P. 480, 10 Ohio S. & P. Dec. 173.

Pa.—*Shontz v. Brown*, 27 Pa. 123. But see *Henderson v. Dodd*, 1 Bailey Eq. (S. C.) 138.

sufficient to establish the relation of debtor and creditor within the meaning of the statute against fraudulent conveyances, and the endorser is as much prohibited from making a voluntary conveyance as if he were the principal.²³ The rule is the same as to an accommodation endorser.²⁴ Where one is surety on an official bond the condition of which is broken, he is indebted, so as to render a voluntary conveyance void for fraud.²⁵ The execution of a bond as surety creates a present indebtedness, so as to render the surety's voluntary conveyance, without consideration, of his estate, fraudulent and void as to the obligee, even though the condition of the bond was not broken nor judgment rendered thereon at the time of the conveyance.²⁶ One whose

23. *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442, 52 Atl. 961, and the fact that the maker of the note was considered responsible when the endorser made the conveyance does not affect the character of the transaction. See also *Pulsifer v. Waterman*, 73 Me. 233; *Thacher v. Jones*, 31 Me. 528.

24. *Primrose v. Browning*, 56 Ga. 369; *Williams v. Banks*, 11 Md. 198; *Post v. Stiger*, 29 N. J. Eq. 554; *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381.

25. *Bay v. Cook*, 31 Ill. 336. But a suitable settlement of real estate upon a wife will not be set aside where the grantor subsequently contracted a liability as surety, the grantor being solvent when it was made, and there being no evidence tending to show fraud. *Crawford v. Logan*, 97 Ill. 396.

Evidence is admissible that at the time of the conveyance the grantor was liable in a large amount as surety on another's bond. *Sharp v. Hicks*, 94 Ga. 624, 21 S. E. 208.

26. *Bowen v. State*, 121 Ind. 235, 23 N. E. 75, conveyance by a surety on a guardian's bond; *Carlisle v.*

Rich, 8 N. H. 44; *In re Appeal Surety*, 5 Ohio S. & C. P. Dec. 571, 7 Ohio N. P. 688; *Kerber v. Ruff*, 4 Ohio S. & C. P. Dec. 406, 3 Ohio N. P. 165, a surety on an appeal bond is a debtor, within the meaning of a statute prohibiting the conveyance of property in fraud of creditors; *Russell v. Stinson*, 4 Tenn. 1. But see *Fales v. Thompson*, 1 Mass. 134, holding that where one, as surety, entered into a rule of reference, he did not become indebted, so as to render a conveyance fraudulent as to creditors, until after judgment on the rule.

Where mortgaged land constitutes a primary fund.—Where a bond executed by father and son for the purpose of raising money to start the son in business was secured by a mortgage on the father's real estate, and the money so received was a gift by the father to the son, as the son was merely surety, and the primary charge was on the land, the liability of the son did not go to increase his indebtedness in determining the question of his insolvency, in an action by creditors to set aside as fraudulent a gift by him to his mother. *In re Babcock*, 12 St. Rep. (N. Y.) 841.

liability as a guarantor is contingent merely until after the conveyance is indebted, within the statute for the protection of creditors from fraudulent conveyances.²⁷ But where the debt for which one was liable as surety at the time of the conveyance was subsequently paid by the principal, the surety's liability therefor should not be considered as a debt in determining the question of his insolvency.²⁸ An individual indebtedness subsequently incurred in substitution of a partnership indebtedness is not such an indebtedness as will vitiate a previous marriage settlement.²⁹ A voluntary conveyance by a husband to his wife, subject to a lien for purchase money due his grantor, is not void as to his subsequent creditors, where such lien was the only debt owing by the grantor.³⁰ A grantor will not be considered to have been a debtor to a person who at the time of the conveyance was his judgment debtor but who subsequently sued him and recovered judgment for money paid under false representations.³¹ A voluntary conveyance may be valid, though the grantor is indebted, if the precedent debts are provided for in the conveyance,³² or sufficiently secured at the time.³³

§ 4. **Payment or provision for payment of debts by grantor.**—Where the conveyance itself provides for the payment of all existing debts, and such debts are actually paid in pursuance of it, or where the debtor subsequently pays and discharges all his debts existing at the time he made the conveyance, the con-

27. *Jackson v. Seward*, 5 Cow. (N. Y.) 67. See also *In re Ridler*, 22 Ch. Div. 74, 52 L. J. Ch. 343, 48 L. T. Rep. N. S. 396, 31 Wkly. Rep. 93. But the guarantor of a debt secured upon land sufficient to satisfy it is not so indebted as to render a voluntary conveyance void as against creditors. *Van Wyck v. Seward*, 6 Paige (N. Y.), 62.

28. *Ayers v. Harrell*, 111 Ga. 864, 36 S. E. 946. But see *Powell v. Westmoreland*, 60 Ga. 572.

29. *Bank v. Marchand*, T. U. P. Charlt. (Ga.) 247.

30. *Appeal of Nippes*, 75 Pa. St. 472; *Williams v. Davis*, 69 Pa. St. 21.

31. *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722.

32. *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520.

33. *Polk County Nat. Bank v. Scott*, 132 Fed. 897, 66 C. C. A. 51; *Lockhard v. Beckley*, 10 W. Va. 87.

veyance is not fraudulent in law and will not be avoided by the fact that the grantor was indebted at the time of the conveyance.³⁴ Such provision for the payment by a grantor of all his debts existing at the time he makes a voluntary conveyance or such subsequent payment repels the idea that he thereby intended to defraud his creditors.³⁵ On the question of the debtor's intent, evidence that at the time the money was paid him for the property sold he said he intended to use all of it to pay his debts is admissible, especially in connection with the fact that soon thereafter he did so pay it out.³⁶ Evidence that a grantor, after making a conveyance, paid the debts which he owed when making it, is competent as a circumstance for the jury to consider in

34. *N. Y.*—*Ocean Nat. Bank v. Hodges*, 9 Hun, 161; *Dygert v. Remerschnider*, 39 Barb. 417, *aff'd* 32 N. Y. 629.

Ill.—*Songer v. Partridge*, 107 Ill. 529; *Parker v. Tiffany*, 52 Ill. 286, the fraud in the transaction having been purged the transfer would cease to be a fraud on his creditors.

Ind. T.—*Purcell Wholesale Grocery Co. v. Bryant* (1905), 89 S. W. 662.

La.—*Copelly v. Deverges*, 11 Mart. (La.) 641.

N. J.—*Clafin v. Mess*, 30 N. J. Eq. 211.

N. C.—*Smith v. Reavis*, 29 N. C. 341.

S. C.—*Ingrem v. Phillips*, 3 Strobb. 565; *Hudnal v. Wilder*, 4 McCord, 294, 17 Am. Dec. 744, but the payment of such debts will not effect the rights of a subsequent purchaser, where the circumstances show that no change of property was actually intended to take place, but that it should revert to the donor as soon as his debts were paid; *Brown v. McDonald*, 1 Hill Eq. 297, payment of debts will not confirm the deed, if the grantor has been constantly indebted in the meantime.

Tenn.—*Spence v. Dunlap*, 74 Tenn. 457; *Vance v. Smith*, 49 Tenn. 343; *Levering v. Norvell*, 68 Tenn. 178, but payment of a large part of the debts does not rebut the evidence of fraud.

Tex.—*Sanger v. Colbert*, 84 Tex. 668, 19 S. W. 863.

Wis.—*Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569.

35. *Dygert v. Remerschnider*, 39 Barb. (N. Y.) 417; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; *Clafin v. Mess*, 39 N. J. Eq. 211; *Hester v. Wilkinson*, 25 Tenn. 215, 44 Am. Dec. 303.

36. *Sanger v. Colbert*, 84 Tex. 668, 19 S. W. 863. But where one purchases the whole of a debtor's property subject to sale under execution, knowing that the vendor is justly indebted and has recently declared his intention not to pay, the mere fact that the vendor assures the purchaser at the time of the sale that one purpose of it is to enable him to pay his debts will not purge the transaction of bad faith as to such purchaser; but he must see to it that the amount is actually applied, so far as necessary, to this discharge of the debt. *Avery v. Johann*, 27 Wis. 246.

determining whether it was made with a fraudulent intent as to creditors.³⁷ Where a conveyance made by one indebted is fraudulent as to existing creditors, it will be fraudulent also as to subsequent creditors, notwithstanding the payment of the particular debts existing, if the indebtedness continues without material interruption.³⁸ Where a grantor makes a voluntary conveyance while indebted, and the stream of his debts continues in equal volume and unbroken current from the time of his gift to his failure, the presumption of fraudulent intent arising from the indebtedness is not rebutted by the fact that the particular debts existing at the time of the conveyance had been paid.³⁹

§ 5. Assumption and payment of debts by grantee.—Where a conveyance was made in fraud of a particular creditor, the fact that the grantee agreed to pay the debt will not save the deed from attack by other creditors.⁴⁰ But it has been held that a fraudulent grantee cannot be held as trustee of the grantor, after having paid *bona fide* debts of the grantor to the full amount of the property received.⁴¹ Although a provision in the conveyance that all the creditors of the grantor should be paid tends

37. *Winchester v. Charter*, 97 Mass. 140.

38. *N. Y.*—*Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733, *aff'd* 21 N. Y. Super. Ct. 75.

Conn.—*Paulk v. Cooke*, 39 Conn. 566.

Ga.—*First Nat. Bank v. Bayliss*, 96 Ga. 684, 23 S. E. 851.

Iowa.—*Barhydt v. Perry*, 57 Iowa, 416, 10 N. W. 820.

N. J.—*Clafin v. Mess*, 37 N. J. Eq. 211.

S. C.—*McElwee v. Sutton*, 2 Bailey, 128.

Va.—*Wilson v. Buchanan*, 7 Gratt. 334.

Wash.—*Mayer v. Frasch*, 7 Wash. 504, 35 Pac. 409.

39. *Loeschigk v. Addison*, 19 Abb. Pr. (N. Y.) 169; *Mills v. Morris*, 1 Hoff. Ch. (N. Y.) 419.

40. *Bassett v. McKenna*, 52 Conn. 437; *Jacobi v. Schloss*, 7 Coldw. (Tenn.) 385. But see *York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494, a debtor may lawfully sell his property, in consideration that the purchase money be paid to some of his creditors, to the exclusion or postponement of others, if it be done without any fraudulent design, and is a present application of his property to the payment of his debts.

41. *Thomas v. Goodwin*, 12 Mass. 140.

strongly to negative fraud on creditors, yet it is not conclusive, and evidence offered to prove such fraud should not be rejected.⁴² An insolvent debtor may sell his property for a reasonable price, where the grantee is responsible, and agrees to apply the proceeds to the payment of the vendor's creditors.⁴³ A conveyance of real estate, in consideration of the vendee's agreement to pay the debts of the vendor, is valid against subsequent creditors.⁴⁴

§ 6. **Effect of insolvency of grantor upon conveyance for valuable consideration.**—A debtor is not deprived of his right to sell or dispose of his property by reason of insolvency or embarrassed financial condition, even though a sale or disposition thereof may hinder or delay creditors. The mere fact of a sale by a party, who is insolvent or in failing circumstances, of his property to a purchaser who has knowledge of his circumstances, does not establish fraud. On the contrary, in many cases, it may be evidence of good faith and an honest desire to appropriate his means to the discharge of his debts. Such would be a fair inference resulting from the transaction, if the price agreed to be paid is the fair and full value thereof, and there were no other circumstances tending to impeach it. The rule is generally maintained that a conveyance will not be set aside as fraudulent merely on the ground of the insolvency of the grantor at the time of its execution.⁴⁵ An insolvent may likewise lease his

42. *Drum v. Painter*, 27 Pa. St. 148.

43. *Young v. Keller*, 16 Mo. App. 550.

44. *Preston v. Jones*, 50 Pa. St. 54. See Assumption of liability as consideration for conveyance, chap. VIII, *infra*.

45. *N. Y.*—*Fuller Electrical Co. v. Lewis*, 101 N. Y. 674, 5 N. E. 437; *Loeschigk v. Bridge*, 42 N. Y. 421, 42 Barb. 471; *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549.

Ala.—*Eufaula Grocery Co. v.*

Petty, 116 Ala. 260, 22 So. 505; *Lienkauf v. Morris*, 66 Ala. 406; *Harkins v. Bailey*, 48 Ala. 376.

Ark.—*Dardenne v. Hardnrick*, 9 Ark. 482.

Fla.—*Ballard v. Eckman*, 20 Fla. 661.

Ga.—*Thornton v. Lane*, 11 Ga. 459.

Ill.—*Wrightman v. Hart*, 37 Ill. 123; *Holbrook v. First Nat. Bank*, 10 Ill. App. 140.

Ind.—*Evans v. Pence*, 78 Ind. 439; *Wooters v. Osborn*, 77 Ind. 513; *Frank v. Peters*, 9 Ind. 343.

property on an adequate consideration, as against his general creditors, when done in good faith.⁴⁶ A conveyance by an insolvent person at a fair valuation to a responsible purchaser, although made by the vendor with intent to hinder, delay and defraud creditors, and although the purchaser knew of the insolvency, is not voidable unless the purchaser knew of the fraudulent intent. There must be a fraudulent intent common to both seller and purchaser.⁴⁷ But insolvency is a badge or evidence of fraud. It is evidence bearing upon the question of good faith or fraudulent intent in the transaction.⁴⁸ And where there is a sale by an insolvent debtor of all his property there is a presumption of law that it is fraudulent, as the necessary effect of such sale would be to hinder and delay creditors. Such pre-

Iowa.—Connolly v. Dillrance, 50 Iowa, 92.

Ky.—Ward v. Totter, 3 T. B. Mon. 1.

La.—Pecot v. Armelin, 21 La. Ann. 667; Whiting v. Prentice, 12 Rob. 141; Dwight v. Bemiss, 16 La. 145; Wright v. His Creditors, 12 La. 308; Barrett v. His Creditors, 4 Rob. 508; Bauduc v. His Creditors, 4 La. 247.

Me.—Stevens v. Robinson, 72 Me. 381.

Minn.—Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528, solvency or insolvency of the person paying the consideration upon a conveyance to another is a mere item of evidence upon the intent with which the consideration was paid and the conveyance taken.

Mo.—Mears v. Gage (Mo. App.), 80 S. W. 712; State ex rel. Pierce v. Merritt, 70 Mo. 275.

Neb.—Crites v. Hart, 49 Neb. 53, 68 N. W. 362; Rothell v. Grimes, 22 Neb. 526, 35 N. W. 392; Joyner v. Van Alstyne, 22 Neb. 172, 34 N. W. 366; Leffel v. Schemerhorn, 13 Neb. 342, 14 N. W. 418.

N. C.—National Bank of Greensboro v. Gilmer, 116 N. C. 684, 22 S. E. 2, where the sale was on long credit to one irresponsible and without security.

Ohio.—Sigler v. Knox County Bank, 8 Ohio St. 511.

Wis.—Hage v. Campbell, 78 Wis. 572, 23 Am. St. Rep. 422, 47 N. W. 179.

46. Stanley v. Robbins, 36 Vt. 422.

47. Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522. See Fraudulent intent and knowledge, chap. XIII, *infra*.

48. *N. Y.*—St. John Woodworking Co. v. Smith, 178 N. Y. 629, 71 N. E. 1139, *aff'd* 82 App. Div. 348, 82 N. Y. Supp. 1025.

Ala.—Harkins v. Bailey, 48 Ala. 376; Beeson v. Wiley, 28 Ala. 575.

Colo.—Sutton v. Dana, 15 Colo. 98, 25 Pac. 90.

Ill.—Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291.

Iowa.—Crary v. Kurtz (1906), 105 N. W. 590; Henny Buggy Co. v. Patt, 73 Iowa, 485, 35 N. W. 587.

sumption, however, may be rebutted.⁴⁹ The relations of the parties to each other, the price agreed to be paid, the credit given, and other circumstances of a suspicious character, are proper to be considered in determining the question of actual fraud.⁵⁰ In the absence of evidence that the vendor was insolvent or in failing circumstances at the time of the sale, it will not be presumed that the sale was fraudulent, in an action by creditors to subject the property to the payment of their claims.⁵¹ A sale of property, however, made with intent to hinder, delay or defraud creditors, is fraudulent as to them, whether the debtor be solvent at the time thereof or not.⁵²

§ 7. Effect of insolvency of grantor upon voluntary conveyances.—A debtor in embarrassed circumstances may not give away his property to the injury and detriment of his *bona fide* creditors. A voluntary conveyance or a conveyance not based on a valuable consideration by a grantor, who is, at the time of making it, insolvent, is generally held to be fraudulent and void as to existing creditors.⁵³ The true inquiry to determine whether or not the grantor was insolvent is: Had he at the time the alleged fraudulent conveyance was made, or did he re-

Md.—Worthington v. Shipley, 5 Gill (Md.), 449.

Minn.—Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; Mower v. Hanford, 6 Minn. 535.

N. C.—Holmes v. Marshall, 78 N. C. 262. See also Badges of fraud; insolvency or indebtedness of grantor, chap. VI, § 14, *supra*.

49. Clark v. Wise, 57 Barb. (N. Y.) 416, 39 How. Pr. (N. Y.) 97; Dodson v. Cooper, 50 Kan. 680, 32 Pac. 370. See also Badges of fraud; transfer of all of debtor's property, chap. VI, § 8, *supra*.

50. Loeschigk v. Bridge, 42 N. Y. 421; National Bank of Greenboro v. Gilmer, 116 N. C. 684, 22 S. E. 2.

51. Brower v. Fass, 60 Neb. 590, 83 N. W. 832.

52. Klauber v. Schloss (Mo.), 95 S. W. 930.

53. *N. Y.*—Multz v. Price, 91 App. Div. 116, 86 N. Y. Supp. 480; Royer Wheel Co. v. Fielding, 31 Hun, 274; Manhattan Co. v. Osgood, 15 Johns. 162, *rev'd* 3 Cow. 612.

Ark.—James v. Mallory (1905), 89 S. W. 472; Sumpter v. Arkansas Nat. Bank, 69 Ark. 224, 62 S. W. 577.

Cal.—Swartz v. Hazlett, 8 Cal. 118.

Del.—Dulany v. Greene, 4 Harr. 285.

Ga.—Cothran v. Forsyth, 68 Ga. 560.

Ill.—Houston v. Maddox, 179 Ill.

tain, sufficient means to pay his debts?⁵⁴ Whether a gift is in fraud of creditors is determined by the fact of the donor's insolvency, and not by his knowledge of the fact, or by his intention to defraud.⁵⁵ A voluntary transfer or conveyance of property will be deemed fraudulent and void as to creditors unless property sufficient to pay debts is retained.⁵⁶ So, a voluntary conveyance, the effect of which is to render the grantor

377, 53 N. E. 599; *Koster v. Hiller*, 4 Ill. App. 21.

Ky.—*Lowry v. Fisher*, 65 Ky. 70, 92 Am. Dec. 475; *Sievers v. Martin*, 26 Ky. L. Rep. 904, 82 S. W. 631.

Md.—*Baxter v. Sewall*, 3 Md. 334.

Mass.—*Matthews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421, where an insolvent husband conveys practically all of his property to his wife in trust with power to sell and apply the proceeds to the payment of such debts of the husband as it might seem judicious to her to pay, the conveyance is fraudulent as to the grantor's creditors, though his motive in making the same was innocent in itself.

Mo.—*Welch v. Mann*, 193 Mo. 304, 92 S. W. 98; *Pullis v. Robison*, 5 Mo. App. 548, *rev'd* 73 Mo. 201.

N. J.—*Young v. Public School Trustees*, 31 N. J. Eq. 290.

Ohio.—*Godell v. Taylor, Wright*, 82.

S. C.—*DuRant v. DuRant*, 36 S. C. 49, 14 S. E. 929; *Ingram v. Phillips*, 5 Strobb. 200; *Wade v. Colvert*, 2 Mill, 26, 12 Am. Dec. 652.

Vt.—*Farmers' Nat. Bank v. Thomson*, 74 Vt. 442, 52 Atl. 961.

Va.—*Wilson v. Buchanan*, 7 Gratt. 334.

54. *Cole v. Tyler*, 65 N. Y. 73. See What constitutes insolvency, § 8, *infra*.

55. *Pullis v. Robison*, 5 Mo. App.

548, *rev'd* 73 Mo. 201. See Intent of grantee immaterial where transfer is voluntary, chap. XIII, § 5, *infra*.

56. *N. Y.*—*Multz v. Price*, 91 App. Div. 116, 86 N. Y. Supp. 480; *Cole v. Tyler*, 65 N. Y. 73; *Spotten v. Keeler*, 12 St. Rep. 385.

Ariz.—*Lewis v. Herrera* (1906), 85 Pac. 245, debtor must possess sufficient property within the State.

Cal.—*Burpee v. Bunn*, 22 Cal. 194; *Swartz v. Hazlett*, 8 Cal. 118.

Ill.—*Wisconsin Granite Co. v. Gerity*, 144 Ill. 77, 33 N. E. 31; *Sander-son v. Snow*, 68 Ill. App. 384; *Lytle v. Scott*, 2 Ill. App. 646.

Iowa.—*Clearfield Bank v. Olin*, 112 Iowa, 476, 84 N. W. 508; *Ware v. Purdy*, 60 N. W. 526.

La.—*Queyrouze v. Thibodeaux*, 30 La. Ann. 1114.

Me.—*Jose v. Hewitt*, 50 Me. 248; *Welcome v. Batchelder*, 23 Me. 85.

Md.—*Swan v. Dent*, 2 Md. Ch. 111.

Minn.—*Filley v. Register*, 4 Minn. 391, 77 Am. Dec. 522.

Miss.—*Edmonson v. Meachan*, 50 Miss. 34; *Vertner v. Humphreys*, 14 S. & M. 130.

Mo.—*Needles v. Ford*, 167 Mo. 495, 67 S. W. 240.

N. H.—*Abbott v. Tenney*, 18 N. H. 109; *Smith v. Smith*, 11 N. H. 459.

N. C.—*Houston v. Bogle*, 32 N. C. 496. But see *Worthy v. Brady*, 91 N. C. 265, a deed is fraudulent or not according to the intent with which it

insolvent as being without sufficient property to pay his debts, is fraudulent and void.⁵⁷

§ 8. **What constitutes insolvency.**—A person is insolvent when his property, subject to execution, at its fair valuation at the time, is not sufficient to satisfy all his debts,⁵⁸ when all his property is not sufficient to pay all his debts;⁵⁹ and insolvency cannot be imputed to a debtor who has property, subject to legal process, sufficient to meet all his liabilities.⁶⁰ It has been held

was made, not according to the value of the property still retained by the grantor.

Ohio.—Farmers' Nat. Bank v. Miller, 9 Ohio Cir. Ct. 111, 6 Ohio Cir. Dec. 1.

S. C.—Richardson v. Rhodus, 14 Rich. L. 95; Ingram v. Phillips, 5 Strobb. 200; McElwee v. Sutton, 2 Bailey, 128; Kirkley v. Blakeney, 2 Nott. & M. 544.

Vt.—Durkee v. Mahoney, 1 Aik. 116.

Wash.—Klosterman v. Harrington, 11 Wash. 138, 39 Pac. 376; Frederick v. Shorey, 4 Wash. 75, 29 Pac. 766.

W. Va.—Reynolds v. Gawthorp's Heirs, 37 W. Va. 3, 16 S. E. 364; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847.

U. S.—Scott v. Mead (D. C.), 37 Fed. 865; Newlin v. Garwood, 18 Fed. Cas. No. 10,172.

57. *Colo.*—Gwynn v. Butler, 17 Colo. 114, 28 Pac. 466.

Conn.—Freeman v. Burnham, 36 Conn. 469.

Ga.—Studebaker Bros. Mfg. Co. v. Key, 99 Ga. 144, 25 S. E. 14; Booher v. Worrill, 57 Ga. 235.

Ill.—Bittenger v. Kasten, 111 Ill. 260; Emerson v. Bemis, 69 Ill. 537.

Ind.—Personette v. Cronkhite, 140 Ind. 586, 4 N. E. 59, although the

debtor claims that it was made with intent to defraud another creditor, and not to defraud the complaining creditors.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Oberneir v. Treseler, 19 Mo. App. 519.

N. H.—Gove v. Campbell, 62 N. H. 401.

S. C.—Jackson v. Lewis, 34 S. C. 1, 12 S. E. 560.

Utah.—Ogden State Bank v. Barker, 12 Utah, 13, 40 Pac. 765.

58. *Dinius v. Lahr* (Ind. App.), 74 N. E. 1033; *David Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877. See also cases cited *supra*, notes 56 and 57, § 7.

59. *Carr v. Summerfield*, 47 W. Va. 155, 34 S. E. 804; *Wolfe v. McGugin*, 37 W. Va. 552, 16 S. E. 797. See *Ernest v. Merritt*, 107 Ga. 61; *German-American Bank v. Schurer*, 102 Wis. 582.

60. *Hendon v. Morris*, 110 Ala. 106, 20 So. 27; *Jennings v. Howard*, 80 Ind. 214; *McCole v. Loehr*, 79 Ind. 430; *Sherman v. Hogland*, 54 Ind. 578. The mere fact that a judgment has been recovered against a debtor is not sufficient to show him insolvent. *Davis v. Yonge* (Ark.), 85 S. W. 90. See also *Treacey v. Liggett*, 9 Can. Sup. Ct. 441.

that a debtor is insolvent when the condition of his affairs is such that he cannot pay his debts as they mature in the ordinary or regular course of business,⁶¹ that insolvency is the inability to pay debts as they become due.⁶² On the other hand it has been held that a debtor cannot be said to be insolvent merely because he has not money enough on hand to meet his liabilities as they fall due in the course of trade;⁶³ or to meet the demands of his creditors without borrowing money.⁶⁴ A debtor does not cease to be insolvent because, being unable to pay his debts in the regular course of business, his creditors have entered into an agreement to extend the time of payment of their debts.⁶⁵ The test of insolvency is not whether, on a postponement of payment of the trader's affairs, there is property sufficient to pay all his debts, but whether he is able as the debts mature, to pay them as traders usually do.⁶⁶ The mere fact that at the time of the conveyance the debtor had not enough unincumbered property to pay his debts is not conclusive evidence of fraud.⁶⁷ But a

A debtor is not insolvent when he owns property together with cash in hand at the time of the transfer sufficient to pay his debts in full, although he subsequently places it beyond the reach of legal process, but the transfer is *prima facie* fraudulent as to creditors. *Cohen v. Parish*, 100 Ga. 335, 28 S. E. 122.

61. *U. S.*—*Merchants' Nat. Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

Mo.—*Moore v. Carr*, 65 Mo. App. 64.

Wis.—*Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226, such is the definition as understood in the administration of bankruptcy and insolvent laws, but as understood in dealing with contracts challenged on the ground of fraud, actual or constructive, it has reference to insuffi-

ciency of assets on a cash basis to cover liabilities.

62. *Ga.*—*Brown v. Spivey*, 53 Ga. 155.

La.—*Lafleur v. Hardey*, 11 Rob. 493; *Brandt v. Shamburgh*, 2 Mart. (N. S.) 329, a debtor who has been obliged to secure extensions from his creditors is insolvent.

N. J.—*National Bank of Metropolis v. Sprague*, 21 N. J. Eq. 530.

63. *Smith v. Collins*, 94 Ala. 394, 10 So. 334.

64. *Silver Valley Min. Co. v. North Carolina Smelting Co.*, 119 N. C. 417, 25 S. E. 954.

65. *Vennard v. McConnell*, 93 Mass. 555; *Brandt v. Shamburgh*, 2 Mart. N. S. (La.) 329.

66. *Chipman v. McClellan*, 159 Mass. 363, 34 N. E. 379; *Traders' Nat. Bank v. Chipman*, id.

67. *Wooters v. Osborn*, 77 Ind. 513.

debtor who has concealed his property in order to defraud his creditors is to be regarded as insolvent, although he has sufficient assets to pay his debts.⁶⁸ If the value of a debtor's property so closely approximate the amount of his liabilities that a conveyance without equivalent consideration would have a direct tendency to impair the rights of creditors, if they should attempt to force collection by judicial process, it will be held fraudulent as to creditors.⁶⁹ A debtor's voluntary conveyance may be set aside at the suit of creditors, whether or not the debtor was insolvent, or believed himself to be so, at the time of the conveyance, if his solvency at the time was contingent on the stability of the market in the business in which he was engaged,⁷⁰ or insolvency would be the inevitable or probable result of want of success in the business in which he was engaged.⁷¹ Cash in hand,⁷² notes and accounts and other evidences of debt,⁷³ should be counted as property on the question of the solvency or insolvency of the donor or grantor. The mere return of an execution partly unsatisfied a year after a conveyance by the judgment debtor does not tend to establish insolvency at the time of the conveyance, in the absence of any other facts.⁷⁴ The fact that at the time of a voluntary conveyance a corporation which the grantor had formed to conduct the business previously owned and carried on by him, and in which he held nearly all the stock, was insolvent, does not show that the grantor is unable to pay his personal debts.⁷⁵

§ 9. Retention of property sufficient to pay debts.—Courts will not interfere to set aside a conveyance or transfer of prop-

68. *Blake v. Sawin*, 10 Allen (Mass.), 340.

69. *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342.

70. *Brown v. Case*, 41 Oreg. 221, 69 Pac. 43.

71. *Carpenter v. Roe*, 10 N. Y. 227. See *Carr v. Breese*, 81 N. Y. 584; *Bertrand v. Elder*, 23 Ark. 494.

72. *Cohen v. Parish*, 100 Ga. 335, 28 S. E. 122.

73. *Powell v. Westmoreland*, 60 Ga. 572.

74. *Wadleigh v. Wadleigh*, 111 App. Div. (N. Y.) 367, 97 N. Y. Supp. 1063.

75. *Welch v. Mann*, 193 Mo. 304, 92 S. W. 98.

erty, as fraudulent and void as against creditors, if it appear that there is retained by the debtor property other than that conveyed out of which their claims can be satisfied, or sufficient to pay all the just debts of the debtor,⁷⁶ except in those states

76. N. Y.—*Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Dunlap v. Hawkins*, 59 N. Y. 342; *Cushman v. Addison*, 52 N. Y. 628; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Guy v. Craighead*, 46 App. Div. (N. Y.) 614, 61 N. Y. Supp. 988, 21 App. Div. (N. Y.) 460, 47 N. Y. Supp. 576; *McCormick v. Wilder*, 61 App. Div. (N. Y.) 619, 70 N. Y. Supp. 627; *Aultman, etc., Co. v. Syme*, 23 App. Div. (N. Y.) 344, 48 N. Y. Supp. 231; *Carpenter v. Roe*, 10 N. Y. 237; *Wilbur v. Fradenburgh*, 52 Barb. (N. Y.) 474; *Holmes v. Clark*, 48 Barb. (N. Y.) 237; *Spicer v. Ayers*, 53 How. Pr. (N. Y.) 405; *Jackson v. Peek*, 4 Wend. (N. Y.) 300; *Van Wyck v. Seward*, 6 Paige (N. Y.), 62; *Starr v. Strong*, 2 Sandf. Ch. (N. Y.) 139.

U. S.—*Bean v. Patterson*, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126; *Providence Sav. Bank v. Huntington*, 10 Fed. 871; *Hinde v. Longworth*, 11 Wheat. (U. S.) 199, 6 L. Ed. 454; *Dick v. Hamilton*, 7 Fed. Cas. No. 3,890, *Deady* (U. S.) 322; *Hopkirk v. Randolph*, 12 Fed. Cas. No. 6,698, 2 Brock. (U. S.) 132.

Ala.—*Johnson v. West*, 43 Ala. 689. But see *Miller v. Thompson*, 3 Port. (Ala.) 198.

Ark.—*Chambers v. Sallie*, 29 Ark. 407; *Smith v. Yell*, 8 Ark. 470.

Cal.—*Windhaus v. Bootz* (Cal.), 25 Pac. 404; *Morgan v. Hecker*, 74 Cal. 540, 16 Pac. 317; *Swartz v. Hazlett*, 8 Cal. 118.

Conn.—*State v. Martin*, 77 Conn. 142, 58 Atl. 745; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610; *Sal-*

mon v. Bennett, 1 Conn. 525, 7 Am. Dec. 237.

Fla.—*Howse v. Judson*, 1 Fla. 133.

Ga.—*Wellmaker v. Wellmaker*, 113 Ga. 1155, 39 S. E. 475; *Brown v. Spivey*, 53 Ga. 155; *Weed v. Davis*, 25 Ga. 684.

Ill.—*Eames v. Dorsett*, 147 Ill. 540, 35 N. E. 735; *Bittenger v. Kasten*, 111 Ill. 260; *Merrell v. Johnson*, 96 Ill. 224; *Fanning v. Russell*, 94 Ill. 386; *Bridgford v. Riddell*, 55 Ill. 261; *Gridley v. Watson*, 53 Ill. 186; *Moritz v. Hoffman*, 35 Ill. 553; *Hitt v. Ormsbee*, 12 Ill. 166; *Koster v. Hiller*, 4 Ill. App. 21; *Lytle v. Scott*, 2 Ill. App. 646; *Russell v. Fanning*, 2 Ill. App. 632.

Ind.—*Ritchie v. McKay* (Ind. App.), 75 N. E. 161; *Emerson v. Opp*, 139 Ind. 27, 38 N. E. 330; *Sell v. Bailey*, 119 Ind. 51, 21 N. E. 338; *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156; *Eiler v. Crull*, 112 Ind. 318, 14 N. E. 79; *Bishop v. State*, 83 Ind. 67; *Noble v. Hines*, 72 Ind. 12; *Holman v. Elliott*, 65 Ind. 78; *Bentley v. Dunkle*, 57 Ind. 374; *Eagan v. Downing*, 55 Ind. 65; *McConnell v. Martin*, 52 Ind. 434; *Brookbank v. Kennard*, 41 Ind. 339; *Ewing v. Patterson*, 35 Ind. 326.

Iowa.—*Robinson v. Frankville First M. E. Church*, 59 Iowa, 717, 12 N. W. 772; *Peerson v. Maxfield*, 51 Iowa, 76, 50 N. W. 77; *Shepard v. Pratt*, 32 Iowa, 296; *Stewart v. Rogers*, 25 Iowa, 395, 95 Am. Dec. 794.

Kan.—*Hunt v. Spencer*, 20 Kan. 126.

Ky.—*Harris v. Harris*, 10 Ky. L.

where a voluntary conveyance is fraudulent *per se* as to existing

Rep. 819; *Enders v. Williams*, 1 Metc. (Ky.) 346.

Md.—*Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Goodman v. Wineland*, 61 Md. 449; *Warner v. Dove*, 33 Md. 579; *Ellinger v. Crowl*, 17 Md. 361; *Williams v. Banks*, 11 Md. 198; *Baxter v. Sewell*, 3 Md. 334.

Mass.—*Bennett v. Bedford Bank*, 11 Mass. 421.

Mich.—*Beach v. White, Walk.* (Mich.) 495.

Minn.—*Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 818; *Reich v. Reich*, 26 Minn. 97, 1 N. W. 804; *Johnston v. Piper*, 4 Minn. 192.

Miss.—*Edmunds v. Mister*, 58 Miss. 765; *Cowen v. Alsop*, 51 Miss. 158; *Cock v. Oakley*, 50 Miss. 628.

Mo.—*Johnson v. Murphy*, 180 Mo. 597, 79 S. W. 909; *Fehlig v. Busch*, 165 Mo. 144, 65 S. W. 542; *Walsh v. Ketchum*, 84 Mo. 427; *Bohannon v. Combs*, 79 Mo. 805; *Vandeventer v. Goss*, 116 Mo. App. 316, 91 S. W. 958; *Updegraff v. Theaker*, 57 Mo. App. 45.

Mont.—*Story v. Black*, 5 Mont. 26, 51 Am. Rep. 37, 1 Pac. 1.

Neb.—*Schreck v. Hanlon*, 66 Neb. 451, 92 N. W. 625; *David Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877; *Trester v. Pike*, 43 Neb. 779, 62 N. W. 211.

N. H.—*Leavitt v. Leavitt*, 47 N. H. 329.

N. J.—*Cort v. Skillin*, 29 N. J. Eq. 70.

N. C.—*Taylor v. Eatman*, 92 N. C. 601; *Hodges v. Spicer*, 79 N. C. 223; *Thacker v. Saunders*, 45 N. C. 145; *Smith v. Reavis*, 29 N. C. 341; *Arnett v. Wanett*, 28 N. C. 41; *Jones v. Youngs*, 18 N. C. 352, 28 Am. Dec.

569. But see *Hodson v. Jordan*, 108 N. C. 10, 12 S. E. 1029, though the grantor reserved ample property to pay all his then existing debts, a deed made with intent by the grantor to defraud his creditors, with knowledge thereof by the grantee, is void as to the creditors.

Ohio.—*Boies v. Johnson*, 25 Ohio Cir. Ct. 331; *Bowlus v. Shanabarger*, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167; *Miller v. Wilson*, 15 Ohio, 108; *Brice v. Myers*, 5 Ohio, 121.

Or.—*Taylor v. Miles*, 19 Or. 550, 25 Pac. 143.

Pa.—*Conley v. Bentley*, 87 Pa. St. 40; *McNair v. Riesher*, 8 Pa. Co. Ct. 494.

S. C.—*Harrell v. Kea*, 37 S. C. 369, 16 S. E. 42; *Richardson v. Rhodus*, 14 Rich. (S. C.) 95; *Buchanan v. McNinch*, 3 S. C. 498; *Hudnal v. Widner*, 4 McCord (S. C.) 294, 17 Am. Dec. 744.

Tenn.—*Burkey v. Self*, 4 Sneed. (Tenn.) 121.

Tex.—*Dosch v. Nette* (Tex.), 16 S. W. 1013; *Dixon v. Sanderson*, 72 Tex. 359, 13 Am. St. Rep. 801, 10 S. W. 535; *Walker v. Loring* (Tex. Civ. App.), 34 S. W. 405; *Morrison v. Clark*, 55 Tex. 437.

Utah.—*Ogden State Bank v. Barker*, 12 Utah, 13, 40 Pac. 765.

Vt.—*Brackett v. Waite*, 4 Vt. 389; *Durkee v. Mahoney*, 1 Aik. (Vt.) 116.

Va.—*Wilson v. Buchanan*, 7 Gratt. (Va.) 334.

Wash.—*Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240.

W. Va.—*Hume, etc., Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56.

Wis.—*Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148.

creditors.⁷⁷ But a voluntary conveyance will be declared void as against creditors where the grantor could not at the time have withdrawn the amount from his estate without hazard to his creditors, or materially lessening their prospects of payment, or leaving it doubtful if anything could be reached by his creditors.⁷⁸ The property left or retained by the debtor must be amply sufficient to pay his existing debts and liabilities and to satisfy all the just claims of his creditors;⁷⁹ and a claim that there

Wyo.—Metz v. Blackburn, 9 Wyo. 481, 65 Pac. 857.

Eng.—Jackson v. Bowley, C. & M. 97, 41 E. C. L. 59. But see Spirett v. Willows, 11 Jur. N. S. 70, 34 L. J. Ch. 365, 3 DeG. J. & S. 293, 12 L. T. Rep. N. S. 614, 13 Wkly. Rep. 329, if it is shown that the remedy of an existing creditor is defeated or delayed by the transfer, it is immaterial whether the debtor was or was not solvent at the time of the transfer, but the contrary rule prevails as to subsequent creditors.

Where a husband purchasing land and taking title in the name of his wife has property remaining, subject to execution, sufficient to pay all his debts, the transaction is not fraudulent as to his creditors. Lang v. Williams, 166 Mo. 1, 65 S. W. 1012.

A man may create a trust for wife or children, by voluntary conveyance, if at the time of conveying he retain in his possession property sufficient to discharge all his debts then existing. Nichols v. Wallace, 41 Ill. App. 627; Nichols v. H. Seiter & Co., id. But claims of creditors cannot be defeated by a subsequent assignment of all the debtor's property in trust for his wife and children. Barnes v. Vetterlein (D. C.), 16 Fed. 218; Greer v. Baughman, 13 Md. 257.

77. Townsend v. Wilson, 114 Ky. 504, 24 Ky. L. Rep. 1276, 71 S. W. 440; Davis v. Anderson, 99 Va. 620, 39 S. E. 588; Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587. See also cases cited under Statutory provisions as to effect of want of consideration, chap. VIII, § 35, *infra*. But see Hume v. Condon, 44 W. Va. 553, 30 S. E. 56; Adams v. Irwin, 44 W. Va. 740, 30 S. E. 59, notwithstanding the statute, a husband may make a donation to his wife, or return her a loan of money, augmented by a portion of the profits of a business conducted by him, if he retains an amount of tangible property largely in excess of his just indebtedness.

78. Kipp v. Hanna, 2 Bland. (Md.), 26; Emerson v. Bemis, 69 Ill. 537; Lowry v. Fisher, 65 Ky. 70, 92 Am. Dec. 475; Black v. Sanders, 46 N. C. 67.

79. *N. Y.*—Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Dunlap v. Hawkins, 59 N. Y. 342.

U. S.—Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363.

Ill.—Patterson v. McKinney, 97 Ill. 41.

N. H.—Bailey v. Ballou, 69 N. H. 414, 44 Atl. 124; Gove v. Campbell, 62 N. H. 401; Smith v. Smith, 11 N. H. 459.

Pa.—Wilson v. Howser, 12 Pa. St. 109.

remains in the debtor's hands sufficient assets to pay his debts will not be sustained if there is reasonable doubt as to their sufficiency.⁸⁰ A conveyance will not be upheld because the grantor retains property nominally enough to discharge his existing indebtedness, if in fact the value of the property so retained is insufficient for that purpose.⁸¹ The question whether

80. Ark.—Bertrand v. Elder, 23 Ark. 494.

Ill.—Ketcham v. Hallock, 55 Ill. App. 632.

Md.—Williams v. Banks, 11 Md. 198.

Ohio.—Crumbaugh v. Kugler, 2 Ohio St. 373.

Retention of property of a speculative and uncertain value by a debtor, which events soon after the conveyance demonstrated to be insufficient to pay his debts, will not relieve the conveyance of its fraudulent character as to creditors. Dillman v. Nedelhoffer, 162 Ill. 625, 45 N. E. 680.

Where the only remaining means of paying consists of the debtor's business prospects, the conveyance is fraudulent as to existing creditors. Wooster v. Devote, 6 Mackey (D. C.), 362. But see In re Gross Estate, 6 Pa. Co. Ct. 113.

Where the property retained includes apparently good securities, a transfer is not fraudulent although the makers of such securities afterwards become insolvent, there being no evidence that when it occurred the makers were insolvent. Harting v. Jockers, 136 Ill. 627, 27 N. E. 188.

Subsequent results are only competent as tending to determine the state and condition of the debtor's estate at the time of the alleged fraudulent conveyance. Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Sufficient assets retained.—Babcock v. Eckler, 24 N. Y. 623, where the debtor owed but \$900 and retained property to the amount of \$10,000; Jackson v. Peck, 4 Wend. (N. Y.) 300, indebtedness trifling, property retained sufficient to meet all demands; Ricketts v. McCully, 54 Tenn. 712, indebtedness \$1,360, real estate retained worth \$2,000 and personalty worth \$1,000; Page v. Kendrick, 10 Mich. 300, indebtedness a small amount which debtor was abundantly able to pay.

Insufficient assets retained.—Black v. Sanders, 46 N. C. 67, 22 negroes and two small tracts of land worth \$7,250 are not sufficient as available to pay debts amounting to \$6,848; Williams v. Banks, 11 Md. 198, where the debts due amounted to the full income of the estate, the retention of a life estate was insufficient where the grantor was over 90 years old; Edmunds v. Mister, 58 Miss. 765, reversion of land retained but all tangible property conveyed for the life of the grantor; Bohn v. Weeks, 50 Ill. App. 236, gift \$6,500, assets \$7,200, debts \$400; Williams v. Hughes, 136 N. C. 58, 48 S. E. 518, assets retained \$11,625, indebtedness \$11,500, debtor entitled to \$1,000 of real estate as a homestead exemption, and \$500 worth of personal property, at his election.

81. Patterson v. McKinney, 97 Ill. 44.

a debtor reserves sufficient property for the payment of existing debts depends on the amount and nature of the property, in connection with its character and situation, in reference to the facilities it affords creditors for collecting their claims.⁸² A conveyance of lands at a time when the grantor, if he could have realized a fair market value on his other properties, could have paid his debts in full without touching the land, is not in fraud of creditors.⁸³ The property retained by the debtor, besides being amply sufficient, must be accessible or available to creditors,⁸⁴ subject to levy upon by execution,⁸⁵ and not incumbered so that

82. *Church v. Chapin*, 35 Vt. 223.

83. *Stratton v. Edwards*, 174 Mass. 374, 54 N. E. 886. But see *Walker v. Loring*, 89 Tex. 668, 36 S. W. 246, retention by donor of sufficient property to bring enough on forced sale to pay existing debts and taxable costs of collection is necessary to prevent the gifts from being fraudulent.

84. *Fla.*—*Howse v. Judson*, 1 Fla. 133.

Miss.—*Edmunds v. Mister*, 58 Miss. 765; *Cock v. Oakley*, 50 Miss. 628.

Mo.—*State ex rel. O'Bryan v. Koontz*, 83 Mo. 323.

N. H.—*Pomeroy v. Bailey*, 43 N. H. 118.

Tex.—*Walker v. Loring*, 89 Tex. 668, 36 S. W. 246.

Eng.—*French v. French*, 6 DeG. M. & G. 95, 55 Eng. Ch. 74, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 2 Jur. N. S. 169, 43 Eng. Reprint, 1166.

85. *Eiler v. Crull*, 112 Ind. 318, 14 N. E. 79, it is no defense for the debtor to show that he had property not subject to execution, out of which he might have paid the debt, if he had chosen to do so; *Camp v. Thompson*, 25 Minn. 175; *Hastings v. Crossland*, 13 Mo. App. 592; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673, where the statute expressly so provided.

Property in another State sufficient to discharge all indebtedness will not relieve from the charge of fraud. *Harding v. Elliott*, 91 Hun (N. Y.), 502, 36 N. Y. Supp. 648, 25 Civ. Proc. R. 294; *Baker v. Lyman*, 53 Ga. 339; *Heath v. Page*, 63 Pa. St. 108, 3 Am. Rep. 533, where the debtor absconded, removing the property with him.

Debts due from out the State which cannot be attached by trustee process will render a conveyance valid. *Church v. Chapin*, 35 Vt. 223.

Unincumbered immovable property must be retained. *Chase v. McCay*, 21 La. Ann. 195.

Exempt property is not to be included. *Williams v. Hughes*, 136 N. C. 58, 48 S. E. 518. But see *Westmoreland v. Powell*, 59 Ga. 256, property which the debtor might have had exempted should be considered, where there is no evidence of intention to take such exemption.

Concealment of property from creditors is *prima facie* fraudulent. *Cohen v. Parish*, 100 Ga. 335, 28 S. E. 122. Such property should not be included. *Walker v. Loring*, 89 Tex. 668, 36 S. W. 246.

his creditors will meet with delay, difficulty, expense, or litigation in obtaining payment and realizing their claims.⁸⁶

§ 10. Effect of insolvency subsequent to transfer.—Except in those jurisdictions where all voluntary conveyances are fraudulent and void as to existing creditors,⁸⁷ the general rule is that a voluntary conveyance by a debtor, who is solvent, though indebted, and who retains sufficient property to pay his debts, where neither insolvency nor inability to meet his obligations is contemplated, will not be rendered fraudulent and void by his subsequent insolvency resulting from causes not existing at the time of the conveyance nor produced thereby, or from causes not contemplated or to be anticipated.⁸⁸ A conveyance from a

86. *Williams v. Banks*, 11 Md. 198; *Bullett v. Worthington*, 3 Md. Ch. 99. But see *Walker v. Loring*, 89 Tex. 668, 36 S. W. 246, although property of a debtor is heavily incumbered the value of the equity of redemption therein may be included in determining whether a voluntary conveyance by him of other property was fraudulent as to creditors, and the fact that delay, difficulty and expense will be incurred before property can be available for creditors, is not a ground for omitting such property in so determining.

87. See Effect of want of consideration as to existing creditors, chap. VIII, § 33, *infra*.

88. *N. Y.*—*Payne v. Freer*, 4 N. Y. Supp. 644; *Gray v. Craighead*, 46 App. Div. 614, 61 N. Y. Supp. 988; *In re Kellogg*, 104 N. Y. 648, 10 N. E. 152.

U. S.—*Metropolitan Nat. Bank v. Rogers*, 53 Fed. 776, 3 C. C. A. 666, 3 U. S. App. 406, subsequent failure due to panic and to consequent shrinkage in value of property and bills receivable; *Wiswell v. Jarvis*, 9 Fed.

84, where the indebtedness was \$3,000 and personal property retained worth four times the amount was four years after the conveyance lost by extraordinary misfortunes; *In re Smith*, 9 Fed. 592.

Ark.—*Smith v. Yell*, 8 Ark. 470; *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301.

Cal.—*Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Morgan v. Hecker*, 16 Pac. 317.

Conn.—*State v. Martin*, 77 Conn. 142, 58 Atl. 745.

Ga.—*Ayers v. Harrell*, 111 Ga. 864, 36 S. E. 946.

Ill.—*Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341, where makers of notes held by grantor afterwards failed; *Patterson v. McKinney*, 97 Ill. 41.

Ind.—*Boyd v. Vickrey*, 138 Ind. 276, 37 N. E. 972; *Eiler v. Crull*, 112 Ind. 318, 14 N. E. 79; *Barkley v. Tapp*, 87 Ind. 25; *Dunn v. Dunn*, 82 Ind. 42.

La.—*Jacobs v. His Creditors*, 11 La. 93.

husband to his wife on a well grounded belief of his early death has been held not fraudulent as to creditors where, at the time of the conveyance, his other property was ample to pay his debts, or there was nothing to show that he was insolvent and unable to pay all his debts, but, on account of his living longer than he expected, he afterwards became unable to pay his debts.⁸⁹ Where the grantor at the time of a voluntary conveyance was deeply indebted and of doubtful solvency and became insolvent within a short time thereafter, the conveyance has been held to be fraudulent as to existing creditors.⁹⁰ Where a grantor of a voluntary

Me.—Usher v. Hazeltine, 5 Me. 471, 17 Am. Dec. 253.

Mass.—Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886, a conveyance in trust for the grantor, made with the purpose of protecting the property from the risks incident to business, but without any intent to contract debts and avoid them by such conveyance, is not in fraud of future creditors.

Mo.—Welch v. Mann, 193 Mo. 304, 92 S. W. 98; American Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Johnson v. Murphy, 180 Mo. 597, 79 S. W. 909, subsequent conversion by the trustee of a trust fund, the grantor having a contingent liability as surety on the trustee's bond at the time of the conveyance; Payne v. Stanton, 59 Mo. 158; Patten v. Casey, 57 Mo. 118; Potter v. McDowell, 31 Mo. 62; Walsh v. Ketchum, 12 Mo. App. 580, 74 Mo. 427. But see Lionberger v. Baker, 88 Mo. 447.

Neb.—Hill v. Fouse, 32 Neb. 637, 49 N. W. 760.

N. H.—Leavitt v. Leavitt, 47 N. H. 329.

N. J.—Rankin v. Gardner (Ch.), 34 Atl. 925.

Ohio.—Creed v. Lancaster Bank, 1 Ohio St. 1.

Pa.—In re Gross' Estate, 6 Pa. Co. Ct. 113, where the debtor relied upon the practice of his profession to bring him pecuniary success.

S. C.—Buchanan v. McNinch, 3 S. C. 498, where subsequent insolvency arose from the general emancipation of 1865, a sudden and extraordinary event which the debtor could neither foresee nor prevent; Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58; Izard v. Middleton, 1 Bailey Eq. 228, insolvency caused by unforeseen calamity; Howard v. Williams, 1 Bailey, 575, 21 Am. Dec. 483; Jacks v. Tunno, 3 Desaus Eq. 1.

Vt.—Wilbur v. Nichols, 61 Vt. 432, 18 Atl. 154; Brackett v. Waite, 4 Vt. 389.

Wash.—Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

W. Va.—Kanawha Valley Bank v. Wilson, 25 W. Va. 242.

Contra.—Black v. Sanders, 46 N. C. 67, under statutory provision.

⁸⁹ American Forcite Powder Co. v. Hanna, 31 App. Div. (N. Y.) 117, 52 N. Y. Supp. 547.

⁹⁰ United States Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed.

conveyance was solvent at the time, subsequent insolvency will not render the conveyance fraudulent as to subsequent creditors.⁹¹ In determining whether a voluntary deed is in fraud of creditors, the true test of solvency is the value of the grantor's other property at the time the deed was executed as compared with his debts, and not the estimated value thereof after his death, which occurred at a considerable time later.⁹²

§ 11. **Executory contract or gift consummated after insolvency.**—Where an executory contract or agreement by a debtor to convey certain property is made on an actual or valuable consideration while the debtor is solvent, a subsequent execution of the agreement or contract, when the debtor has become insolvent, is nevertheless valid as against his creditors.⁹³ But a voluntary conveyance executed by a debtor in consummation of a parol gift made, when unembarrassed,⁹⁴ or the subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee,⁹⁵ is not valid as against existing creditors. Where a voluntary conveyance, made while the grantor is insolvent, is withheld from record because he believes it inoperative, a subsequent conveyance, made in contemplation of insolvency, is fraudulent as to creditors, though made to effectuate the first conveyance.⁹⁶ And

954; *Banning v. Purinton*, 105 Iowa, 642, 75 N. W. 639.

91. *N. Y.*—*Spicer v. Ayers*, 53 How. Pr. 405.

Iowa.—*Lyman v. Cessford*, 15 Iowa, 229.

Ohio.—*Evans v. Lewis*, 30 Ohio St.

11.

92. *Ayers v. Harrell*, 111 Ga. 864, 36 S. E. 946.

93. *La.*—*Wyer's Syndics v. Sweet*, 2 Mart. N. S. 588.

Mass.—*Holmes v. Winchester*, 133 Mass. 140.

Pa.—*Hand v. Hitner*, 140 Pa. St. 166, 21 Atl. 200, a contract which is unreasonable, and gives extravagant

compensation for services, made by a solvent debtor, and carried out after his insolvency, is not a fraud in law against creditors who were not such at the time it was made. See *Boustead v. Shaw*, 27 Grant Ch. (U. C.) 280.

94. *Hubbard v. Allen*, 59 Ala. 283; *Rucker v. Abell*, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; *Doe v. McKinney*, 5 Ala. 719; *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989.

95. *Hendon v. White*, 52 Ala. 597.

96. *Talcott v. Levy*, 20 N. Y. Supp. 440, 29 Abb. N. C. (N. Y.) 3 *aff'd* 143 N. Y. 636, 37 N. E. 828.

a parol gift of land, the title being retained until the grantor had incurred a large indebtedness, when a voluntary conveyance was made, is ineffectual as against creditors, notwithstanding the grantee had been permitted for some years to take the rents and profits.⁹⁷ But a gift of land made at a time when the donor was solvent has been held valid where the donee moved on the land, paid taxes and made valuable improvements, although later when the deed was given the donor was in failing circumstances and soon after became insolvent.⁹⁸ Where a gift was consummated before insolvency but the conveyance in exchange for the gift was after the donor's insolvency, the conveyance was held valid, in the absence of fraudulent intent.⁹⁹

§ 12. **Insolvency at time suit is brought.**—The rule has been maintained in some jurisdictions that, in order to entitle a creditor to set aside his debtor's conveyance as fraudulent, in the absence of intent to defraud, he must allege and prove not only that the grantor had no other property subject to execution at the time of the conveyance, but also that he had no such property at the time of the commencement of the action.¹ It has also been held that it is not essential to the right of a creditor to attack as fraudulent a mortgage executed by the debtor, that the debtor shall have been insolvent at or about the time of the

97. *Bank of Willows v. Small*, 144 Cal. 709, 78 Pac. 263.

98. *Patterson v. McKinney*, 97 Ill. 41.

99. *Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 870, 50 N. W. 503.

1. *Taylor v. Johnson*, 113 Ind. 164, 15 N. E. 238; *Eiler v. Crull*, 112 Ind. 318, 14 N. E. 79; *Bishop v. State*, 83 Ind. 67; *Wooters v. Osborn*, 77 Ind. 513; *Burlington Protestant Hospital Assoc. v. Gerlinger*, the plaintiff must show that defendant was insolvent when action was brought; *Montana Lumber, etc.,*

Co. v. Gerhold, 17 Mont. 558, 44 Pac. 87, where the jury found that a debtor was, at or since the time he made the conveyance, the owner of sufficient property subject to execution for the satisfaction of his indebtedness, but it was not found that he was possessor of any property, other than that conveyed when the original action was brought or when the judgment therein was entered, or when the action to subject such property thereunder was commenced, the conveyance was held to be fraudulent.

execution of the mortgage, if he is insolvent at the time the attack is made, though the fact of his insolvency at the time of the execution of the mortgage may be relevant to the question of fraud.² Where a case finds that the debtor is insolvent at the time judgment is rendered, his insolvency will be considered as extending back beyond a voluntary conveyance of his property made during his insolvency, unless the contrary is shown.³ But insolvency at the time when suit is brought cannot relate back to the time the conveyance was made so as to show an intent different from that which existed when the conveyance was made.⁴

2. *Banning v. Purinton*, 105 Iowa, 642, 75 N. W. 639, *citing* *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Hager v. Shindler*, 29 Cal. 48; *Rounds v. Green*, 29 Minn. 139, and

disapproving *Romine v. Romine*, 59 Ind. 346.

3. *Carlisle v. Rich*, 8 N. H. 44.

4. *American Forcite Powder Mfg. Co. v. Hanna*, 31 App. Div. (N. Y.) 117, 52 N. Y. Supp. 547.

CHAPTER VIII.

CONSIDERATION.

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Section 1. Nature and sufficiency of consideration generally.

—It is not sufficient to condemn a conveyance of land made by a debtor, as a fraud upon creditors of the grantor, that it was voluntary and not founded on a valuable consideration. An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration, provided he has ample property left to satisfy all the just claims of his creditors. The person assailing the deed assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities.

ties.¹ A conveyance founded on a good, but not on a valuable, consideration is voluntary, and may be void as to creditors; when a consideration is necessary, it must be a valuable one.² A gratuity cannot afterwards be converted into a debt so as to become the consideration for a conveyance made by the grantor to the injury of his creditors,³ nor will a *donatio mortis causa* affect the rights of creditors of the donor.⁴ In a suit to set aside a conveyance as in fraud of creditors, the grantee may establish a valuable consideration for the conveyance by showing the payment of money by him to the grantor,⁵ or the payment by him of debts of the grantor due to third persons,⁶ or the discharge of legal or equitable

1. *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Genesee River Nat. Bank v. Mead*, 92 N. Y. 637; *Holden v. Burnham*, 63 N. Y. 74; *Dygert v. Remerschnider*, 32 N. Y. 637; *Wilbur v. Fradenburgh*, 52 Barb. (N. Y.) 480; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *McCole v. Loehr*, 79 Ind. 432; *Whitesel v. Hiney*, 62 Ind. 168; *Sherman v. Hogland*, 54 Ind. 579; *Pence v. Croan*, 51 Ind. 338. And see chap. VIII, §§ 32-36, *infra*.

2. *N. Y.*—*Seymour v. Wilson*, 19 N. Y. 417; *Smith v. Perine*, 49 Hun, 605, 1 N. Y. Supp. 495; *Seward v. Jackson*, 8 Cow. 406.

Ala.—*Norwood v. Washington*, 136 Ala. 657, 33 So. 869; *Killough v. Steele*, 1 Stew. & P. 262.

Conn.—*Clarke v. Black*, 78 Conn. 467, 62 Atl. 757; *Trumbull v. Hewitt*, 62 Conn. 448, 26 Atl. 350; *Washband v. Washband*, 27 Conn. 424.

Mo.—*Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

N. C.—*Jones v. Ruffin*, 14 N. C. 404.

Pa.—*Wilson v. Howser*, 12 Pa. St. 109.

Tex.—*Deutsch v. Allen*, 57 Tex. 89.

Va.—*Davis v. Anderson*, 99 Va. 620, 39 S. E. 588; *Harvey v. Steptoe*,

17 Gratt. 289; *Ruddle's Ex'rs v. Ben*, 10 Leigh, 467; *Broadfoot v. Dyer*, 3 Munf. 350.

A deed should not be deemed voluntary and void because no consideration appears on its face, if there is in reality a valuable and sufficient consideration. *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676; *Hanna v. Towers*, 3 Har. & J. (Md.) 147, 5 Am. Dec. 427. Nor because there is a misstatement as to the nature of the consideration. *Commonwealth Bank v. Kearns*, 100 Md. 202, 59 Atl. 1010. Compare Recital of false consideration, chap. VI, § 2, *supra*.

Uncertainty in the amount of consideration is an element of fraud. *Montgomery's Ex'rs v. Kirksey*, 26 Ala. 172. But a conveyance is not necessarily void because it transfers an uncertain amount of property for an uncertain consideration. *Angell v. Pickard*, 61 Mich. 561, 28 N. W. 680.

3. *Clay v. McCally*, 5 Fed. Cas. No. 2,869, 4 Woods, 605.

4. *Chase v. Redding*, 79 Mass. 418.

5. *Miller v. Rowan*, 108 Ala. 598, 19 So. 9; *Billgery v. Ferguson*, 30 La. Ann. 34.

6. *Miller v. Rowan*, *supra*; *Pique*

liabilities to the grantee.⁷ The consideration may consist of other things than money but which possess a pecuniary value,⁸ or confer

Arendale, 71 Ala. 91, whether created either before or contemporaneously with the conveyance.

7. *Neal v. Foster*, 36 Fed. 29; *Miller v. Rowan*, *supra*; *Carlisle v. Gas-kill*, 4 Ind. 219, a conveyance of land to a husband in satisfaction of a claim for damages for the seduction of his wife.

A conveyance by an insolvent to an attorney of preferred creditors, to pay counsel fees incurred by such creditors, in the defence of the preference against other creditors, is invalid as to other creditors, since there being no obligation on the part of the insolvent to pay such fees, the consideration was not a valuable one. *Simon v. Norton*, 56 Mo. App. 338.

8. *U. S.*—*Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960.

Cal.—*Hunt v. Hammel*, 142 Cal. 456, 76 Pac. 378, services rendered.

Col.—*Homestead Min. Co. v. Reynolds*, 30 Colo. 330, 70 Pac. 422; *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181.

Iowa.—*Hinkel v. Downing*, 116 Iowa, 693, 88 N. W. 1088.

Mass.—*Parker v. Barker*, 43 Mass. 423, a conveyance of land for a mortgage of land.

Mo.—*Redpath v. Lawrence*, 42 Mo. App. 101.

Neb.—*Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976, relinquishment of a valid entry of land under the timber culture act of Congress.

N. J.—*First Nat. Bank of Asbury Park v. White*, 60 N. J. Eq. 487, 46 Atl. 1092.

Tex.—*Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep.

792; *Chessher v. Clamp*, 10 Tex. Civ. App. 350, 30 S. W. 466, merchandise.

Va.—*Ruddle's Ex'rs v. Ben*, 10 Leigh, 467.

W. Va.—*Farmers' Bank v. Gould*, 48 W. Va. 99, 35 S. E. 878, 86 Am. St. Rep. 24.

Can.—*Randall v. Dopp*, 22 Ont. 422.

Eng.—*Blount v. Doughty*, 3 Atk. 481, 26 Eng. Reprint, 1076; *Stephens v. Olive*, 2 Bro. Ch. 90, 29 Eng. Reprint, 52; *Woerell v. Jacob*, 3 Meriv. 256, 36 Eng. Reprint, 98; *Carter v. Hind*, 2 Wkly. Rep. 27; *Heep v. Tonge*, 9 Hare, 90, 20 L. J. Ch. 661, 41 Eng. Ch. 90. Compare *Doe v. Rolfe*, 35 E. C. L. 775, 3 N. & P. 648.

A mortgage to secure the debt of another is not voluntary. *Marden v. Babcock*, 2 Metc. (Mass.) 99.

Stock of corporation organized by debtor.—Where a debtor organizes a corporation, and transfers his property to it without other consideration than the stock of such corporation, the transaction is fraudulent as to creditors. *Shumaker v. Davidson*, 116 Iowa, 569, 87 N. W. 441. But see *Gardner v. Haines* (S. D.), 104 N. W. 244. See also *Organization of corporation*, chap. II, § 16, *supra*.

A transfer of property from an old to a new corporation through an individual held constructively fraudulent as to creditors of the old corporation. *McNeal v. Hayes Mach. Co.*, 103 N. Y. Supp. 312.

The release by a lessee of his rights under the lease, made in consideration of the lessor agreeing to forego his rights to collect rent, is supported by a sufficient consideration. *Livesley v. Heise* (Or.), 85 Pac. 509.

some substantial advantage upon the grantor.⁹ Services rendered by an attorney are sufficient consideration.¹⁰ The true ownership of property is a sufficient consideration to support the reconveyance by a fraudulent grantee to his grantor.¹¹ Where the consideration for a deed fails, the obligation to reconvey is a sufficient consideration for a deed executed for that purpose.¹² The equitable ownership is a sufficient consideration to sustain a conveyance from the holder of the bare legal title.¹³ A conveyance of an equity of redemption by a mortgagor to a mortgagee, without the payment of any new consideration, and with intent to delay or defeat creditors, cannot be regarded as a voluntary conveyance, and therefore void as against creditors of the mortgagor, if the amount of the debt secured by the mortgage is equal to the whole value of the land.¹⁴

§ 2. **Nominal consideration.**—A conveyance for a mere nominal consideration, when attacked as fraudulent, will be subjected to the same rules as are applicable to voluntary transfers.¹⁵ A purely nominal consideration, no actual consideration being paid, for the conveyance of property by a debtor, is not a good or valuable consideration, as against existing creditors, and renders the conveyance voluntary and fraudulent as to them.¹⁶ But a nominal

9. *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, an advantage enuring to a city as the grantor of lands by the establishment of military headquarters there by the United States.

Permission for cancellation of a judgment of separation and maintenance is a consideration, as against creditors of the husband, for his assignment to the wife. *Tisdale v. Rider*, 104 N. Y. Supp. 77.

10. *Reed v. Mellor*, 5 Mo. App. 567; *Sullivan v. Ball*, 55 S. C. 343, 33 S. E. 486; *Pirie v. Stern*, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103.

11. *Farmers' Bank v. Gould*, 48 W. Va. 99, 35 S. E. 878, 86 Am. St.

Rep. 24. See Reconveyance by fraudulent grantee, chap. IV, § 34, *supra*.

12. *Forbush v. Willard*, 33 Mass. 42.

13. *First Nat. Bank of Amsterdam v. Miller*, 24 App. Div. (N. Y.) 551, 49 N. Y. Supp. 981, *rev'd* on other grounds, 163 N. Y. 164, 57 N. E. 308. See also Property transferred by debtor to equitable owner, chap. IV, § 31, *supra*.

14. *Williams v. Robbins*, 81 Mass. 590. See Conveyance of property of little or no value—valueless equity of redemption, chap. IV, § 4, *supra*.

15. *California Consol. Min. Co. v. Manley* (Idaho), 81 Pac. 50.

16. N. Y.—*Ten Eyck v. Witbeck*,

consideration is sufficient as against the grantor.¹⁷ A slight consideration, when not disproportionate to the value of the property or interest transferred, is sufficient, as against creditors.¹⁸

§ 3. **Illegal consideration.**—An illegal consideration is not a good or valuable consideration to support a conveyance or transfer of a debtor's property. For example, a husband's conveyance of property to his wife in consideration of her discontinuing a pending divorce action,¹⁹ or a conveyance in consideration of future illicit intercourse,²⁰ or of past illicit sexual intercourse,²¹ or a conveyance in consideration of an agreement not to prosecute a debtor for a misdemeanor affecting public interests,²² or a conveyance pursuant to an antenuptial contract made in consideration of a promise of marriage where both parties participated in the fraud

135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809; *O'Brien v. Cavanagh*, 36 Misc. Rep. 362, 73 N. Y. Supp. 558; *Royer Wheel Co. v. Fielding*, 61 How. Pr. 437, a nominal consideration of \$100; *Manhattan Co. v. Evertson*, 6 Paige, 457.

U. S.—*Polk County Nat. Bank v. Scott*, 132 Fed. 897, 66 C. C. A. 51; *Ridgeway v. Underwood*, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

Ala.—*Gunn v. Hardy*, 130 Ala. 642, 31 So. 443; *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Felder v. Harper*, 12 Ala. 612.

Fla.—*McKeown v. Allen*, 37 Fla. 490, 20 So. 556.

Ky.—*Ward v. Trotter*, 3 T. B. Mon. 1; *McKinley v. Combs*, 1 T. B. Mon. 105.

Mo.—*Lionberger v. Baker*, 88 Mo. 447, *aff'd* 14 Mo. App. 353.

Ohio.—*Stoltz v. Vanatta*, 32 Wkly. Lan. Bul. 100.

Or.—*Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635.

Utah.—*Gustin v. Mathews*, 25

Utah, 168, 70 Pac. 402. Compare *Martin v. White*, 115 Ga. 866, 42 S. E. 279; *Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. 885.

17. See cases cited in last preceding note.

18. *Klosterman v. Vader*, 6 Wash. 99, 32 Pac. 1055.

19. *Friedman v. Bierman*, 43 Hun, 387; *Morgan v. Potter*, 17 Hun, 403, a note given by a husband to his wife for money lent to him, which had previously been paid to her for discontinuing a divorce suit, was held not to be a valid claim against the husband's estate, as against creditors; *Oppenheimer v. Collins*, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406.

20. *Wait v. Day*, 4 Den. (N. Y.) 439.

21. *Jackson v. Miner*, 101 Ill. 550; *Hargroves v. Meray*, 2 Hill Eq. (S. C.) 222, such conveyances are voluntary and may be avoided; *Fletcher v. Sidley*, 2 Vern. 490.

22. *Sharp v. Philadelphia Warehouse Co.*, 10 Fed. 379.

or had notice of the fraudulent intent,²³ will be set aside at the instance of creditors as fraudulent and void.

§ 4. **Fictitious consideration.**—A conveyance or transfer made with intent to convey property in discharge of a supposed debt, which in law is not a debt, or to indemnify the grantee against a responsibility created as a pretense, or for any fictitious consideration, is fraudulent and void as against creditors, and will be set aside.²⁴

§ 5. **Natural love and affection.**—The law sanctions a conveyance founded upon the consideration of blood or marriage merely, and the legal presumption is that such a conveyance is valid and not a fraud upon the rights of anyone.²⁵ But a conveyance in consideration of natural love and affection is merely voluntary and cannot be supported against the rights of prior or existing creditors,²⁶ unless the grantor is not so indebted as to deprive the

23. *Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

24. *Ala.*—*Weingarten v. Marcus*, 121 Ala. 187, 25 So. 852.

Ky.—*Drane v. Underwood*, 1 Ky. L. Rep. 317.

La.—*Preslar v. Walker*, 116 La. 661, 40 So. 1033.

Mich.—*Hunt v. Schier*, 59 Mich. 286, 26 N. W. 494.

Mo.—*Kramer v. McCaughy*, 11 Mo. App. 426, an alleged trust in personal property.

N. C.—*Johnson v. Murchison*, 60 N. C. 286, 1 Winst. 292; *Leadman v. Harris*, 14 N. C. 144.

Pa.—*Taylor's Appeal*, 45 Pa. St. 71.

Tenn.—*Gibbs v. Thompson*, 26 Tenn. 179.

Tex.—*Watts v. Dubois* (Civ. App. 1902), 66 S. W. 698; *Hinson v. Walker*, 65 Tex. 103.

Wyo.—*Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

Can.—*Ball v. Ballantyne*, 11 Grant Ch. (U. C.) 199.

See Fictitiousness of consideration, chap. VI, § 3, *supra*; Recital of false consideration, chap. VI, § 2, *supra*; chap. XIII, § 11, *infra*.

25. *Frazer v. Western*, 1 Barb. Ch. (N. Y.) 220.

26. *Ala.*—*McKee v. West* (1904), 37 So. 740, it is fraudulent *per se* as against existing creditors; *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748; *Gannard v. Eslava*, 20 Ala. 732.

Mich.—*Farrand v. Caton*, 69 Mich. 235, 37 N. W. 199.

Ohio.—*Holmes v. Sullivan*, 9 Ohio Dec. 499, 14 Wkly. L. Bul. 167.

Tex.—*Moreland v. Atchison*, 34 Tex. 351.

Eng.—*Mathews v. Feaver*, 1 Cox Ch. 278, 1 Rev. Rep. 39, 29 Eng. Reprint, 1165.

Can.—*Doe v. Blanchfield*, 1 U. C. Q. B. 350.

creditors of an ample fund for the payment of their debts.²⁷ A conveyance in consideration of blood and affection, though by one indebted at the time, is *prima facie*, and not conclusively, fraudulent as against creditors.²⁸ A conveyance founded on natural love and affection is valid as against subsequent purchasers.²⁹

§ 6. **Moral obligation.**—The discharge of a moral obligation to perform a duty or promise, to pay a debt, or to convey property, is sufficient to sustain a conveyance or transfer of property by a debtor, as against the debtor's creditors.³⁰ In some jurisdictions it is held that a moral obligation is not a sufficient consideration,

27. *N. Y.*—*Stewart v. Town*, 4 Cow. 599, 15 Am. Dec. 405.

Md.—*Atkinson v. Phillips*, 1 Md. Ch. 507.

N. H.—*Pomeroy v. Bailey*, 43 N. H. 118.

28. *Thompson v. Hammond*, 1 Edw. Ch. (N. Y.) 497; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Redfield v. Buck*, 35 Conn. 328, 95 Am. Dec. 241.

29. *Stewart v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405. *Contra*, *Freeman v. Eatman*, 38 N. C. 81, 40 Am. Dec. 444; *Burton v. LeRoy*, 4 Fed. Cas. No. 2217, 5 Sawy. 510.

30. *N. Y.*—*Smith v. Perine*, 49 Hun, 605, 1 N. Y. Supp. 495; *Ocean Nat. Bank v. Hodges*, 9 Hun, 161; *Fellows v. Emperor*, 13 Barb. 92.

U. S.—*George v. Higgins*, bottom, 34 U. S. 48, 9 L. Ed. 46.

Ala.—*Moog v. Fraley*, 79 Ala. 246, a conveyance which equity would have sustained is not fraudulent as to creditors.

Iowa.—*Cottrell v. Smith*, 63 Iowa, 181, 18 N. W. 865, such a conveyance is valid as against a judgment creditor whose judgment was not a lien on the land conveyed.

Ky.—*Poynter v. Mallory*, 20 Ky. L. Rep. 284, 45 S. W. 1042.

Neb.—*Columbia Nat. Bank v. Baldwin*, 64 Neb. 732, 90 N. W. 890, a parol trust is a sufficient consideration to support an executed deed against the grantor's creditors.

N. D.—*Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60.

Pa.—*Dougherty v. Mortland* 8 Pa. Cas. 384, 11 Atl. 234.

Tenn.—*Rosenbaum v. Davis* (Ch. App. 1898), 48 S. W. 706.

Promise made during coverture.—A mortgage by a widow to secure a debt of her deceased husband, which she had during his life promised to pay, is valid as against her creditors, since such promise, though not binding on her, constitutes a sufficient consideration for the mortgage. *Appeal of Sharpless*, 140 Pa. St. 63, 21 Atl. 239.

Not a voluntary conveyance.—A conveyance of the subsequently acquired legal title of real property to the grantee in a quitclaim deed, executed when the grantor held only the equitable title, is not a voluntary conveyance which may be attacked as such by creditors of the grantor. *Stanton v. Crane*, 25 Nev. 114, 58 Pac. 53. See also *Schreyer v. Platt*, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955;

and that the law presumes that a voluntary conveyance, resting upon moral motives, is void as against existing creditors.³¹

§ 7. **Executory consideration.**—An executory consideration which fails, or which has not been fully executed, is insufficient to support a conveyance or transfer as against the creditors of the grantor.³² A conveyance by an insolvent debtor, with the intention of using the proceeds thereof in discharge of the claims of certain of his creditors, need not be made for cash in hand,³³ and allowing time merely for the payment of the purchase money does not affect the *bona fides* of a sale.³⁴ But unusual length of credit extended to the purchaser, taken in connection with other suspicious circumstances, will render a conveyance fraudulent as to creditors.³⁵ When a debtor conveys property to one holding his notes for a greater amount than the price of the property, although no payment in money is made, nor any express promise of payment, nor the notes given up, nor

Property transferred to debtor by equitable owner, chap. IV, § 31, *supra*.

31. *Ala.*—Hubbard v. Allen, 59 Ala. 283.

Cal.—Fidelity, etc., Co. v. Thompson, 128 Cal. 506, 61 Pac. 94.

Me.—Jose v. Hewitt, 50 Me. 248, conveyance by a bank director, who was surety on a defaulting cashier's bond, to the bank to make good the defalcation.

Miss.—Cock v. Oakley, 50 Miss. 628.

Vt.—Fair Haven Marble, etc., Co. v. Owens, 69 Vt. 246, 37 Atl. 749, transfer of property to pay for services rendered to a debtor, without contract for compensation, by members of his family.

Eng.—Gilham v. Locke, 9 Ves. Jr. 612, 22 Eng. Reprint, 741.

See chap. VIII, § 18, *infra*, as to pre-existing liability.

32. Robinson v. Stewart, 10 N. Y.

189; Warren v. Wilder, 12 St. Rep. (N. Y.) 757; Farmer's, etc., Nat. Bank v. Conner (Ky. 1892), 20 S. W. 265; Wisner v. Farnham, 2 Mich. 472; Blanik v. Barta, 130 Wis. 121, 109 N. W. 980.

The presumption of fraud, arising from the non-payment of the consideration, may be rebutted, if subsequently the consideration is paid in good faith, as agreed upon. Alexander v. Todd, Fed. Cas. No. 175, 1 Bond, 175.

33. Priest v. Brown, 100 Cal. 626, 35 Pac. 323.

34. O'Neil v. Orr, 5 Ill. 1; Helfrich v. Stein, 17 Pa. St. 143; Ligon v. Tillman (Tex. Civ. App. 1897), 43 S. W. 1069.

35. Sattler v. Marino, 30 La. Ann. 355; Owen v. Arvis, 26 N. J. L. 22; Grannis v. Smith, 22 Tenn. 179; Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

the amount of the bill endorsed on them, the implied promise to pay is a good consideration.³⁶

§ 8. **Promissory notes and bonds.**—A negotiable promissory note is a valuable consideration for a conveyance or transfer by a debtor,³⁷ especially where the insolvency of the maker is not shown,³⁸ or where the conveyance is made without any knowledge on the part of the grantee of the fraudulent intent of the debtor to defraud his creditors.³⁹ But where the insolvency of the maker is shown,⁴⁰ or the note is given by a person not financially responsible and is unsecured,⁴¹ or where knowledge of the fraudulent intent of the grantor is brought home to the grantee,⁴² the note is not a sufficient consideration, and the grantee is not such a purchaser as the law will protect.

§ 9. **Future services.**—A conveyance or transfer of property by a debtor executed in consideration of future services of any kind is void as against existing creditors.⁴³ A conveyance by an

See Sales on Credit, chap. VI, § 18, *supra*.

36. *Boswell v. Green*, 25 N. J. L. 390.

37. *McCreery v. Gordon*, 38 Hun (N. Y.) 467; *Earl v. Earl*, 186 Ill. 370, 57 N. E. 1079, *rev'd* 87 Ill. App. 491; *Gordon v. Alexander* (Mich. 1899), 80 N. W. 978; *Crites v. Hart*, 49 Neb. 53, 68 N. W. 362; *Rodgers v. Kinsey*, 8 Ohio Dec. 308, 7 Wkly. L. Bul. 64; *Tillman v. Heller* (Tex. 1890), 14 S. W. 271. Compare *Oppenheimer v. Guckenheimer*, 39 Fla. 617, 23 So. 9; *Burgroff v. Bagby*, 17 Ky. L. Rep. 820, 32 S. W. 940; *Williams v. Barnett*, 52 Tex. 130. See also Sales on credit, chap. VI, § 18, *supra*.

Notes of an infant are not a sufficient consideration. *Vance v. Phillips*, 6 Hill (N. Y.) 433; *Overall v.*

Parker (Tenn. Ch. App. 1899), 58 S. W. 905.

38. *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458.

39. *Starin v. Kelly*, 36 N. Y. Super. Ct. 366; *LePage v. Slade*, 79 Tex. 473, 15 S. W. 496.

40. *Nesbitt v. Digby*, 13 Ill. 387.

41. *Danby v. Sharp*, 2 McArthur (D. C.) 435; *Beaver v. Danvill Shirt Co.*, 69 Ill. App. 320; *Haymaker's Appeal*, 53 Pa. St. 306; *Dillard, etc., Co. v. Smith*, 105 Tenn. 372, 59 S. W. 1010.

42. *Nesbitt v. Digby*, 13 Ill. 387; *Deakers v. Temple*, 41 Pa. St. 234; *Kepner v. Burkhart*, 5 Pa. St. 478.

43. *Robinson v. Stewart*, 10 N. Y. 189; *Swift v. Hart*, 35 Hun (N. Y.) 128; *Lehman v. Bentley*, 60 N. Y. Super. Ct. 473, 18 N. Y. Supp. 778;

insolvent debtor to his attorney, to pay him for services to be rendered in the future, is fraudulent and void as to existing creditors.⁴⁴ It is a fraud on creditors to allow a debtor to sell his property for payment of contingent and possible liabilities for future services.⁴⁵ But a mortgage by an insolvent debtor to secure his attorney for services to be rendered in litigation which such debtor anticipates will arise over the winding up of his business is not fraudulent as to other creditors.⁴⁶ An assignment by the insolvent, in trust to secure the payment of services to be thereafter rendered by one under no present legal obligation to render them, is void, as against the creditors of the assignor.⁴⁷

§ 10. **Future support.**—A conveyance of land in consideration of future maintenance, in the absence of evidence of existing creditors at the time of its execution, is valid.⁴⁸ But an agreement to furnish for the grantor or those dependent upon him future support and maintenance, although it may be valid as

Perry v. Hardison, 99 N. C. 21, 5 S. E. 230. See also *South Omaha Nat. Bank v. Boyd* (Ark. 1906), 97 N. W. 288.

Services rendered prior to death of grantor.—A conveyance by an intestate to her children in accordance with an agreement that they should be paid for their services will not be set aside as fraudulent, in an action by her administrator in behalf of a creditor, merely because the value of the property was in excess of the sum due the children at the date of the conveyance, where at the time of the intestate's death the value of the services amounted to a sum equal to the value of the property conveyed. *Darling v. Ricker*, 68 Vt. 471, 35 Atl. 376.

44. *Shideler v. Fisher*, 13 Colo. App. 105, 57 Pac. 864; *Ringgold v.*

Leith, 73 Ill. App. 656; *Winfield Nat. Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *Fuller v. Croco*, 46 Kan. 634, 26 Pac. 944. But see *Farmers', etc., Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552.

45. *Crain v. Gould*, 46 Ill. 203.

46. *Cortland Wagon Co. v. Gordy*, 98 Ga. 527, 25 S. E. 574; *In re Parsons*, 150 Mass. 343, 23 N. E. 50, a mortgage to secure an attorney reasonable compensation for future services in obtaining the mortgagor's discharge in insolvency, made in good faith, is not void as to creditors; *Morrell v. Miller*, 28 Or. 354.

47. *Brainard v. Dunning*, 30 N. Y. 211; *In re Gordon*, 49 Hun (N. Y.), 370, 3 N. Y. Supp. 589.

48. *Hennon v. McClane*, 88 Pa. St. 219.

between the parties, is not a good and valuable consideration sufficient to sustain a conveyance or transfer by a debtor, as against existing creditors, and such a conveyance is fraudulent and void as to the grantor's existing creditors,⁴⁹ especially where the conveyance includes all of the debtor's property.⁵⁰ Where the grantee partially performs his contract, however, this constitutes a valuable consideration for the conveyance, when at-

49. *N. Y.*—*Robinson v. Stewart*, 10 N. Y. 189; *Todd v. Monell*, 19 Hun, 362.

Ala.—*Woodward v. Kelly*, 85 Ala. 368, 5 So. 164, 7 Am. St. Rep. 57.

Conn.—*Pettibone v. Stevens*, 15 Conn. 19, 38 Am. Dec. 57.

Ind.—*Spiers v. Whitesell*, 21 Ind. App. 204, 61 N. E. 28.

Iowa.—*Coleman v. Gammon* (1900), 83 N. W. 898; *Seekel v. Winch*, 108 Iowa, 102, 78 N. W. 821, a conveyance in consideration of future maintenance is voluntary; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Graham v. Rooney*, 42 Iowa, 567.

Ky.—*Brown v. Moore*, 21 Ky. L. Rep. 664, 52 S. W. 944; *Hawkins v. Moffitt*, 49 Ky. 81.

Me.—*Spear v. Spear*, 97 Me. 498, 54 Atl. 1106; *Sidensparker v. Sidenparker*, 52 Me. 481, 83 Am. Dec. 527; *Webster v. Withey*, 25 Me. 326.

Minn.—*McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589.

N. H.—*Albee v. Webster*, 16 N. H. 362; *Smith v. Smith*, 11 N. H. 459.

Ohio.—*Krider v. Koons*, 5 Ohio Cir. Ct. 221, 3 Ohio Cir. Dec. 110.

Pa.—*Downing v. Gault*, 8 Pa. Super. Ct. 52; *Shakely v. Guthrie*, 2 Pa. Super. Ct. 414.

W. Va.—*Flaherty v. Stephenson* (1904), 49 S. E. 131; *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 46 S. E. 920.

Wis.—*Faber v. Matz*, 86 Wis. 370, 57 N. W. 39.

But compare *Gale v. Williamson*, 10 L. J. Exch. 446, 8 M. & W. 405.

But such conveyance is good as against subsequent creditors. *Mahoney v. Hunter*, 30 Ind. 246; *Webster v. Withey*, 25 Me. 326; *Hennon v. McClane*, 88 Pa. St. 219; *Gorman v. Urquhart* (Can.), 2 N. Brunsw. Eq. 42. See also *Mills v. Mills*, 40 Tenn. 705.

50. *N. Y.*—*Kain v. Larkin*, 4 App. Div. (N. Y.) 209, 38 N. Y. Supp. 546.

Ill.—*Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; *Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341, *aff'd* 31 Ill. App. 67; *Annis v. Bonar*, 86 Ill. 128; *Parker v. Cain*, 28 Ill. App. 598.

Iowa.—*Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158.

Kan.—*Pettyjohn v. Newhart*, 7 Kan. App. 64, 51 Pac. 969.

Me.—*Graves v. Blondell*, 70 Me. 190; *Rollins v. Mooers*, 25 Me. 192.

Minn.—*Henry v. Hinman*, 25 Minn. 199.

Mo.—*Massey v. McCoy*, 79 Mo. 169.

Vt.—*Woodward v. Wyman*, 53 Vt. 645; *Church v. Chapin*, 35 Vt. 223; *Jones v. Spear*, 21 Vt. 426; *Crane v. Stickles*, 15 Vt. 252. Compare *Town of Lyndon v. Belden*, 14 Vt. 423.

tacked by the grantor's creditors, and the grantee may be protected to the extent of payments made by him in good faith.⁵¹ Where a conveyance is made in consideration of future support and the agreement has been fully executed, the consideration becomes a valuable one, and the conveyance cannot be set aside as fraudulent and void as to creditors, unless it be shown that it was made with the actual intent to delay and defraud creditors, and that the grantee at the time of the conveyance had notice of such intent.⁵² A grantee in good faith and for value, though part of the consideration was his agreement to support the grantor, is protected, although the conveyance was intended by the grantor to defraud his creditors; but the creditors may hold the grantee for the estimated value of the agreement, as a debt to the grantor.⁵³ A conveyance by a debtor of all his property to another for an inadequate present consideration, together with an agreement to support and maintain the grantor during his life, is void as to existing creditors.⁵⁴ Where, however, a full and adequate consideration is paid by the grantee, the fact that he also agrees to support the grantor will not render the conveyance void as to creditors.⁵⁵ Where property is conveyed in consideration of an agreement for future support, a conveyance of the property by the grantee to one who assumes the first grantee's obligation, is held to be valid as to the creditors of the first grantee.⁵⁶

§ 11. **Future advances.**—A *bona fide* mortgage or other conveyance is not fraudulent as to the creditors of the mortgagor or

51. *Harris v. Brink*, 100 Iowa, 366, 69 N. W. 684, 62 Am. St. Rep. 578; *Walker v. Cady*, 106 Mich. 21, 63 N. W. 1005; *Long Branch Banking Co. v. Dennis*, 56 N. J. Eq. 549, 39 Atl. 689; *Constable v. Weaser*, 8 Ohio Dec. 339, 7 Wkly. L. Bul. 113.

52. *Hayes v. Montgomery*, 118 Ind. 91, 20 N. E. 646; *Gregory v. Lamb*, 19 Ky. L. Rep. 943, 42 S. W. 339; *Kelsey v. Kelley*, 63 Vt. 41, 22 Atl.

597, 13 L. R. A. 640; *Hisle's Adm'r v. Rudasill*, 89 Va. 519, 16 S. E. 673.

53. *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100.

54. *Egery v. Johnson*, 70 Me. 258; *Graves v. Blondell*, 70 Me. 190.

55. *Torrey Cedar Co. v. Eul*, 95 Wis. 615, 70 N. W. 823.

56. *Perkins v. Scott*, 7 Ky. L. Rep. 596; *Hendrick v. Dillon*, 62 Vt. 430,

grantor, as a matter of law, because it is given, in whole or in part, to secure future advances to be made by the mortgagee or grantee to the mortgagor or grantor.⁵⁷ In some jurisdictions, it is held that such a conveyance is valid, although it does not state on its face that it is given to secure future advances;⁵⁸ while in other jurisdictions, the rule is maintained that the conveyance must express the object, and that a conveyance intended to cover future responsibilities not expressed in the instrument, is void *pro tanto* as against creditors.⁵⁹ A mortgage which does not state the amount intended to be secured, or the limit of which is undefined, is valid for the amount of the advances, as against

18 Atl. 814. See Assumption of Liability, § 14, *infra*.

57. *Ala.*—Lawson v. Alabama Warehouse Co., 80 Ala. 341.

Cal.—Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

Iowa.—Carson v. Byers, 67 Iowa, 606, 25 N. W. 826, there is no presumption of fraud.

Kan.—Clement v. Hartzell, 57 Kan. 482, 46 Pac. 961.

Md.—Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645.

Mass.—Commercial Bank v. Cunningham, 41 Mass. 270, 35 Am. Dec. 322; Adams v. Wheeler, 27 Mass. 199.

Mich.—Dummer v. Smedley, 119 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; Brace v. Berdan, 104 Mich. 356, 62 N. W. 568; Newkirk v. Newkirk, 56 Mich. 525, 23 N. W. 206.

Minn.—Berry v. O'Connor, 33 Minn. 29, 21 N. W. 840.

Miss.—Arthur v. Commercial, etc., Bank, 17 Miss. 394, 48 Am. Dec. 719.

N. H.—North v. Crowell, 11 N. H. 251.

Compare Heiney v. Anderson, 9 Lanc. Bar (Pa.), 13.

It is valid if it is free from fraud.—Seaman v. Fleming, 7 Rich.

Eq. 283. See also Garvin v. Garvin, 55 S. C. 360, 33 S. E. 458; Farguson v. Johnson, 36 Fed. 134.

Advances made before levy on property transferred.—Where an insolvent debtor in good faith conveys property to a creditor, partly in consideration of an existing obligation and partly as security for future advances, and before creditors levy an attachment on the property the grantee has made advances to, and incurred liabilities for, the debtor to the full value of the property, the conveyance will be good as against such creditors. Coles v. Sellers, 1 Phila. (Pa.) 533, 11 Leg. Int. 30.

58. Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490, 3 Det. L. N. 417; Brace v. Berdan, 104 Mich. 356, 62 N. W. 568.

59. Divver v. McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; Matz v. Erick, 76 Conn. 388, 56 Atl. 630; Thurman v. Jenkins, 58 Tenn. 426; Turbeville v. Gibson, 52 Tenn. 565; Neuffer v. Pardue, 35 Tenn. 191; Alexandria Sav. Int. v. Thomas, 29 Gratt. (Va.) 483.

a creditor by judgment recovered after such advances were made, though the debt on which the judgment was recovered was contracted before the advances were made.⁶⁰ A transfer to secure existing debts and future advances is valid.⁶¹ But an assignment by a debtor of all his property, in trust to pay the assignee for future advances to the assignor, in preference to debts already due, is void.⁶² A judgment confessed to secure future advances is, by statute, in some jurisdictions, void as to creditors.⁶³ Where, however, the advances have been made, equity will not interfere, notwithstanding such a statute, unless the judgment is fraudulent, and though the judgment is entered in violation of the statute, it is not *ipso facto* void against creditors.⁶⁴

§ 12. **Contingent liability in general.**—A future and contingent debt or liability may be a sufficient consideration for a conveyance or transfer by a debtor to secure or indemnify the grantee against the same, and such a conveyance is not fraudulent as against creditors.⁶⁵ That a debtor mortgages his property to secure future and contingent debts is not, of itself, proof of a fraudulent intent.⁶⁶ A judgment confessed by an insolvent to

60. Robinson v. Williams, 22 N. Y. 380. See also Alexandria Sav. Int. v. Thomas, *supra*.

61. Hendricks v. Walden, 17 Johns. (N. Y.) 438; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Ex parte Gaines, 12 Ch. D. 314, 40 L. T. Rep. N. S. 789, 27 Wkly. Rep. 744.

62. Barnum v. Hempstead, 7 Paige (N. Y.), 568; Lawyer v. Barker, 45 W. Va. 468, 31 S. E. 964.

63. Gladney v. Manning, 48 La. Ann. 316, 19 So. 276; Clapp v. Ely, 27 N. J. L. 555; State v. Fife, 2 Bailey (S. C.) 337.

64. Clapp v. Ely, *supra*. See also Fraudulent confession of judgment, chap. II, § 11, *supra*.

65. Marks v. Reynolds, 12 Abb. Prac. (N. Y.) 403, *rev'g* 20 How. Prac. (N. Y.) 338, but under Code, § 382, the person who may be secured by a confession of judgment is the plaintiff in the judgment; Gardner v. Maxwell, 27 La. Ann. 561; Moore v. Ragland, 74 N. C. 343; Gibson v. Walker, 33 N. C. 327; Creighton v. Scranton Lace-Curtain Mfg. Co., 191 Pa. St. 231, 43 Atl. 134; Braden v. O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Warren v. His Creditors, 3 Wash. St. 48, 28 Pac. 257. Compare Pemberton v. Klein, 43 N. J. Eq. 98, 10 Atl. 837.

66. Gardner v. Maxwell, *supra*; Moore v. Ragland, *supra*.

secure a *bona fide* creditor, whether contingent or otherwise, even though it be intended to and does have the effect of giving him a preference over other creditors, is not fraudulent in law.⁶⁷ A liability for another on a contract in force is a good consideration for a conditional sale, and, though the value of the property exceed the amount of the liability, the sale is not therefore fraudulent *per se*.⁶⁸

§ 13. **Security to endorser, surety, or guarantor.**—A transfer of property by a debtor, by way of pledge, judgment note, mortgage, deed of trust, or other conveyance, executed for the purpose of indemnifying or protecting one who has become endorser, surety, or guarantor for him against that obligation, is based on a valuable and sufficient consideration, and is valid as against his creditors, in the absence of fraud.⁶⁹ But the mere liability of a surety to pay

67. *Braden v. O'Neil, supra.* See also Confession of judgment, chap. II, § 11, *supra*.

68. *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74.

A covenant from which covenantor may be relieved, on account of the failure of a transfer for which it was made, is not a good consideration. *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712.

69. *N. Y.*—*Peetsch v. Sommers*, 31 App. Div. 255, 53 N. Y. Supp. 438, 28 Civ. Proc. 124; *Miller v. Miller Knitting Co.*, 23 Misc. Rep. 404, 52 N. Y. Supp. 184; *Dodge v. McKechnie*, 35 N. Y. Supp. 1106, *aff'd* 156 N. Y. 514, 51 N. E. 268. But compare *Browning v. Hart*, 6 Barb. 91; *Bailey v. Burton*, 8 Wend. 339.

Del.—*Tunnell v. Jefferson*, 5 Har. 206.

Ill.—*Farmers', etc., Bank v. Spear*, 49 Ill. App. 409, where a surety, to whom a principal debtor has given a

judgment note to indemnify him, enters judgment on said note before he has paid the debts on which he is surety, that fact does not render the judgment fraudulent.

Ky.—*Beatty v. Dudley*, 4 Ky. L. Rep. 212.

La.—*Edgar v. Simons*, 2 La. 19, a deposit of notes as collateral security against a letter of credit; *Woodward v. Braynard*, 6 Mart. (O. S.) 572.

Md.—*Griffith v. Frederic County Bank*, 6 Gill & J. 424. Compare *Amoss v. Robinson*, 2 Har. & J. 320.

Mass.—*Rogers v. Abbott*, 128 Mass. 102; *Gardner v. Webber*, 34 Mass. 407; *Cutler v. Dickinson*, 25 Mass. 386; *Ripley v. Severance*, 23 Mass. 474, 17 Am. Dec. 397; *Stevens v. Bell*, 6 Mass. 339.

Mich.—*Bostwick v. Benjamin*, 63 Mich. 289, 29 N. W. 714; *Spear v. Rood*, 51 Mich. 140, 16 N. W. 312; *Adams v. Niemann*, 46 Mich. 135, 8

his principal's debt cannot, as against the principal's existing creditors, be deemed a valid consideration for the absolute conveyance by the principal of substantially all his property to the surety.⁷⁰ The liability of the vendee to damage, as the surety of the vendor, is not of itself a sufficient consideration to support an absolute conveyance of property, as against creditors.⁷¹ And an absolute conveyance by an insolvent debtor to his surety on an administration bond, intended only as an indemnity against the surety's antecedent liability, is fraudulent as against existing

N. W. 719; *Hubbard v. Taylor*, 5 Mich. 155.

Mo.—*Gee v. Van Natta-Lynds Drug Co.*, 105 Mo. App. 27, 78 S. W. 228.

Mont.—*Tudor v. DeLong*, 18 Mont. 499, 46 Pac. 258.

Neb.—*Grimes v. Sherman*, 25 Neb. 843, 41 N. W. 814. Compare *Morse v. Steinrod*, 29 Neb. 108, 46 N. W. 922.

N. H.—*Lane v. Sleeper*, 18 N. H. 209, if the security is not larger than the purpose of indemnity requires.

Pa.—*Goodwin v. McMinn*, 204 Pa. St. 162, 53 Atl. 762; *Candee's Appeal*, 191 Pa. St. 644, 43 Atl. 1093; *Heiney v. Anderson*, 9 Lane. Bar. 13.

R. I.—*Johnson's Petition*, 20 R. I. 108, 37 Atl. 531.

Tenn.—*Madisonville Bank v. McCoy* (Ch. App. 1897), 42 S. W. 814.

Tex.—*Keating Implement, etc., Co. v. Terre Haute Carriage, etc., Co.*, 11 Tex. Civ. App. 216, 32 S. W. 556; *Alamo Cement Co. v. San Antonio* (Civ. App. 1893), 23 S. W. 449.

Vt.—*Spaulding v. Austin*, 2 Vt. 555, although the note upon which he becomes surety proves to be void for usury, he is entitled to hold the property for his protection until he is indemnified or relieved from liability on the note.

Va.—*Harvey v. Anderson* (1896), 24 S. E. 914.

W. Va.—*Weaver v. R. L. Neal & Co.* (1906), 55 S. E. 909. Compare *Crawford v. Kirksey*, 50 Ala. 590, 55 Ala. 282, 27 Am. Rep. 704.

Confession of judgment on claim not due.—Before maturity of a note held by a bank which had discounted it for the maker, there is nothing due from the maker to an indorser, and a confession of judgment on the note by the maker in favor of the indorser will be set aside at the instance of a subsequent judgment creditor of the maker. *Forrester v. Straus*, 18 N. Y. Supp. 41, 21 Civ. Proc. 166. See *Confession of judgment*, chap. II, § 11, *supra*.

In a deed of trust to indemnify sureties by giving them a preference, the debt of the creditor supplies the consideration, to support the deed, entitling such creditor's interest to be considered as the primary object to be protected in equity, and the sureties' indemnity is but secondary and incidental to the other object. *Wiswall v. Potts*, 57 N. C. 184.

70. *Craft v. Schlag*, 61 N. J. Eq. 567, 49 Atl. 431.

71. *Gorham v. Herrick*, 2 Me. 87.

creditors, no additional liability being contemporaneously incurred by such surety.⁷² A mortgage purporting to secure an absolute indebtedness, given in good faith, is not void as to creditors of the mortgagor, because it was given to secure the mortgagee against a contingent liability as surety.⁷³

§ 14. **Assumption of liability in general.**—The assumption of certain *bona fide* debts or obligations of an insolvent debtor by the grantee is a valuable and sufficient consideration for the conveyance or transfer of property by the debtor to the person assuming them,⁷⁴ without the concurrence or assent of the creditors being

72. Proskauer v. People's Sav. Bank, 77 Ala. 257.

73. Rexroad v. Johnson, 6 Kan. App. 607, 49 Pac. 699. See Recital of false consideration, chap. VI, § 2, *supra*.

74. N. Y.—Rutherford v. Schattman, 119 N. Y. 604, 23 N. E. 440; Hine v. Bowe, 114 N. Y. 350, 21 N. E. 733, debts due primarily by one of a firm, which subsequently the firm became liable for under the partnership agreement and by indorsement; Weaver v. White, 64 Hun, 636, 19 N. Y. Supp. 616. Compare Stutson v. Brown, 7 Cow. 732.

U. S.—Sonstiby v. Keeley, 11 Fed. 578.

Ind.—Old Nat. Bank v. Heckman, 148 Ind. 490, 47 N. E. 953; Miller v. Lebanon Lodge No. 48, I. O. O. F., 88 Ind. 286; Anderson v. Smith, 5 Blackf. 395.

Iowa.—Smith v. Mack, 94 Iowa, 539, 63 N. W. 181.

Ky.—Cavanagh v. Riley, 94 Iowa, 539, 63 N. W. 181.

Mass.—Pierce v. O'Brien, 189 Mass. 58, 75 N. E. 61; Boston Mar. Ins. Co. v. Proctor, 168 Mass. 498, 47 N. E. 414; Guild v. Leonard, 35 Mass. 511.

Mich.—Globe Casket Mfg. Co. v. Wolcott, 106 Mich. 151, 64 N. W. 10.

Mo.—Baker v. Harvey, 133 Mo. 453, 34 S. W. 853.

N. H.—Hutchins v. Sprague, 4 N. H. 496, 17 Am. Dec. 439.

Or.—Jolley v. Kyle, 27 Or. 95, 39 Pac. 999.

Tex.—Traders' Nat. Bank v. Clare, 76 Tex. 47, 13 S. W. 183; Duveneck v. Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541.

Can.—Dedesdernier v. Burton, 12 Grant Ch. (U. C.) 569.

Eng.—Bungard v. Seabrook, 1 F. & F. 321.

Compare Rahn v. Kniess, 74 Ill. App. 367; Riegel v. Wooley, 81 Pa. St. 227.

An assignment of certain rents to accrue for one year, in consideration of the assignee's agreement, provided the rents are paid to him, to pay certain sums on account of the assignor, is valid against the assignor's creditors to the extent of such payments by the assignee, although the payments are made before collecting the rents. Smith v. Jennings, 81 Mass. 69.

That the expressed considera-

given to the arrangement, and without any suspension or extinguishment of the claims of those creditors as against the original debtor,⁷⁵ and although the assumption was without the knowledge of the persons whose debts were assumed.⁷⁶ But a transfer of property materially greater in value than the amount of the debts assumed will be regarded as constructively fraudulent as to the creditors to the excess of the value of the goods.⁷⁷ Where a debtor conveys or transfers property to a creditor, in consideration of the satisfaction of a debt due the creditor and his assumption of the payment of debts due other creditors, such conveyance is not fraudulent, if the debt due the grantee and the debts due other creditors assumed by him equal the amount or full and fair value of the property conveyed.⁷⁸ Where a grantee, in part consideration of a conveyance, makes himself personally liable for the payment of distributive shares to the grantor's heirs, this constitutes a valu-

tion was larger than the amount of the indebtedness assumed is no evidence of fraud, where the amount of the indebtedness assumed and paid by the grantee is equal to or greater than the actual value of the property conveyed to him. *Wall v. Beedy*, 161 Mo. 625, 61 S. W. 864. See Recital of false consideration, chap. VI, § 2, *supra*.

75. *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151.

76. *National Bank of Republic v. Dickinson*, 107 Ala. 265, 18 So. 144.

77. *Gamble v. Aultman*, 125 Ala. 372, 28 So. 30, a conveyance of land worth \$2,000 in consideration of the payment of a lien of \$1,100; *Grieb v. Caraker*, 69 Ill. App. 236, where the debts amounted to only about one-half of the property; *Diamond Coal Co. v. Carter Dry Goods Co.*, 20 Ky. L. Rep. 1444, 49 S. W. 438, goods sold for less than half their value; *Randall v. Vroom*, 30 N. J. Eq. 353, where incumbrances assumed were

less in amount than the actual value of the property.

78. *Ala.*—*Chipman v. Stern*, 89 Ala. 207, 7 So. 409; *McCord v. Ten-nille*, 81 Ala. 168, 1 So. 177; *Smith v. Spencer*, 73 Ala. 299.

Cal.—*Saunderson v. Broadwell*, 82 Cal. 132, 23 Pac. 36.

Iowa.—*Gould v. Hurto*, 61 Iowa, 45, 15 N. W. 588.

Me.—*Stevens v. Hinckley*, 43 Me. 440. *Compare* *Welcome v. Batchelder*, 23 Me. 85.

Miss.—*Agricultural Bank v. Dorsey*, *Freem.* 338.

Neb.—*Berry v. Berk*, 62 Neb. 535, 87 N. W. 309; *Keith v. Heffelfinger*, 12 Neb. 497, 11 N. W. 749.

Tex.—*Traders' Nat. Bank v. Clare*, 76 Tex. 47, 13 S. W. 183; *Sweeney v. Conley*, 71 Tex. 543, 9 S. W. 548; *Hugo & Schmeltzer Co. v. Hirsch* (Civ. App. 1901), 63 S. W. 163; *Dix v. Jackman* (Civ. App. 1906), 37 S. W. 344; *Mack v. Block* (1888), 8 S. W. 495.

able consideration for the conveyance when attacked by the grantor's creditors.⁷⁹ An agreement to pay a portion of an insolvent's debts, sufficient in amount to have formed an adequate consideration for a transfer of his land, will not be upheld as against his creditors, where the grantee in fact paid only a small portion of the debts agreed to be paid. In order to support the conveyance the consideration must have been fully executed in good faith before notice of the transferrer's insolvency.⁸⁰ An assumption by a grantee of an unmatured debt does not affect the validity of the sale where the grantor was under contract to pay such debt.⁸¹ But the assumption by a grantee of the payment of a debt for which the grantor is not liable, and of the payment of attorney's fees for services to be rendered for the grantor, is not a valid consideration.⁸² And the assumption of indebtedness, after the conveyance has been made, and process has issued against the property included therein, is not a valid consideration.⁸³

§ 15. Assumption and payment of debt by endorser or surety.

—If a surety in good faith assumes the payment of the debt of his principal, on which he is liable, it is a valid and sufficient consideration, for a conveyance or transfer of the debtor's property to him, and such conveyance is valid as against creditors.⁸⁴ A conveyance or transfer of property, at its fair value, by the maker of a promissory note or other such instrument to one who has endorsed his paper in consideration of the latter's agreeing to as-

79. *Constable v. Weaser* (D. C.), 8 Ohio Dec. 339, 7 Wkly. L. Bul. 113.

80. *Warren v. Wilder*, 12 St. Rep. (N. Y.) 757.

81. *National Bank of Republic v. Dickinson*, 107 Ala. 265, 18 So. 144.

82. *Shepherd v. Fish*, 78 Ill. App. 198.

83. *Farmers', etc., Bank v. Conner*, 14 Ky. L. Rep. 316, 20 S. W. 265.

84. *Ala.*—*Pollock v. Jones*, 96 Ala. 492, 11 So. 529; *Harmon v. McRae*, 91 Ala. 401, 8 So. 548; *Pennington*

v. Woodall, 17 Ala. 685; *Bank of Alabama v. McDade*, 4 Port. 252.

Ga.—*McWhorter v. Wright*, 5 Ga. 555.

Ind.—*Powell v. Stickney*, 88 Ind. 310.

Kan.—*Smith v. Rankin*, 45 Kan. 176, 25 Pac. 586.

Me.—*Stevens v. Hinkley*, 43 Me. 440; *Stedman v. Vickery*, 42 Me. 132.

Neb.—*Kaufman v. Coburn*, 30 Neb. 672, 46 N. W. 1010.

Compare Ayers v. Hulsted, 15 Conn. 504.

sume the payment of the note, is based upon a consideration sufficient to sustain the transfer as against existing creditors of the grantor.⁸⁵ Accommodation endorsers are to be regarded as creditors and not as mere purchasers.⁸⁶

§ 16. **Assumption of mortgage or other lien.**—A conveyance in consideration of the assumption of a mortgage or other lien or encumbrance on the property conveyed or transferred renders the grantee liable to pay for it, and is a valuable consideration.⁸⁷ Where the encumbrances assumed are less in amount than the actual value of the property conveyed, the conveyance will be set aside as fraudulent as against creditors of the grantor.⁸⁸

§ 17. **Executed agreement to pay debts.**—Payment of the grantor's debts may properly be taken into consideration in determining the sufficiency of the consideration for a conveyance as against creditors, where such payment was made in pursuance of an assumption of the debts at the time of the transfer,⁸⁹ and where the grantee has paid the specified debts as agreed as consideration for the conveyance, it is a good defense to an action or proceeding instituted by the creditors of the grantor against him.⁹⁰

85. *Flannery v. Van Tassel*, 62 Hun (N. Y.), 621, 16 N. Y. Supp. 741; *Coffin v. Day*, 34 Fed. 687; *State, Kramer v. Mason*, 96 Mo. 559, 10 S. W. 179; *Ellis v. Herrin* (N. J. Ch. 1892), 24 Atl. 129.

86. *State, Kramer v. Mason*, *supra*.

87. *Goodenow v. Friott*, 89 Iowa, 671, 57 N. W. 437; *Miles v. Miles*, 6 Or. 266, 25 Am. Rep. 522; *Dubbs v. Finley*, 2 Pa. St. 379. See, however, *Webb v. Atkinson*, 124 N. C. 447, 32 S. E. 737, where property was conveyed which the grantee afterwards sold for \$20,000 more than sufficient to pay the liens, the surplus being paid over to the debtor, the conveyance was declared fraudulent as to creditors.

88. *Jameson v. Dilley*, 27 Ind. App. 429, 61 N. E. 601; *Randall v. Vroom*, 30 N. J. Eq. 353.

89. *Watson v. Tool*, 36 Ala. 13; *Hannan's Lessee v. Reese*, 1 Browne (Pa.), 11.

90. *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Robinson v. Mitchell*, 62 N. H. 529. It has been held that where a debtor gave goods to a creditor on condition that certain of his debts should be paid from the proceeds, and part of the goods were sold and the debts paid, that other creditors of the debtor had no claim upon the remainder, the gift having been originally valid as against creditors. *Riegel v. Wooley*, 81 Pa. St. 227.

Payment of mortgage after

§ 18. **Pre-existing liability — Payment or satisfaction of, or security for, pre-existing debt.**—A conveyance or transfer of property by an insolvent debtor to his creditor in payment of a pre-existing or antecedent debt will be upheld if the debt be *bona fide*, its amount not materially less than the fair and reasonable value of the property, and payment of the debt is the sole consideration, and no use or benefit is secured or reserved to the debtor.⁹¹

conveyance to another.—A person who on purchasing property has assumed to pay off a mortgage existing thereon, and who has subsequently conveyed the property to his wife by an assignment not in fraud of his creditors, may pay off the mortgage without committing a fraud on his creditors, since he might be compelled to pay it by action; and thereupon he becomes substituted to the rights and interest of the original mortgagee in the premises. *Wilbur v. Fradenburg*, 52 Barb. (N. Y.) 474.

91. *N. Y.*—*O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206; *Stacy v. Deshaw*, 7 Hun, 449; *Loeschigk v. Hatfield*, 5 Rob. 26.

U. S.—*Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 948, 42 C. C. A. 106; *Budlong v. Kent*, 28 Fed. 13.

Ala.—*G. Ober & Sons Co. v. Phillips Buttorff Mfg. Co.* (1906), 40 So. 278; *Truitt v. Crook*, 129 Ala. 377, 30 So. 618; *McLendon v. Grice*, 119 Ala. 513, 24 So. 846; *Goetter v. Norman*, 107 Ala. 585, 19 So. 56; *Goetter v. Smith*, 104 Ala. 481, 16 So. 534; *Curran v. Olmstead*, 101 Ala. 692, 14 So. 398; *Fargerson v. Hall*, 99 Ala. 209, 13 So. 302; *Steiner v. Lowery*, 98 Ala. 208, 13 So. 320; *Dawson v. Flash*, 97 Ala. 539, 12 So. 67; *Chipman v. Stern*, 89 Ala. 207, 7 So. 409; *Mobile Sav. Bank v. McConnell*, 87 Ala. 736, 6 So. 703; *McDowell v.*

Steele, 87 Ala. 493, 6 So. 288; *Knowles v. Street*, 87 Ala. 357, 6 So. 273; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386; *Moog v. Farley*, 79 Ala. 246.

Ark.—*Carl, etc., Co. v. Beal, etc., Grocer Co.*, 64 Ark. 373, 42 S. W. 664.

Colo.—*Tennis v. Barnes*, 11 Colo. App. 196, 52 Pac. 1038.

Ill.—*Beidler v. Crane* (1889), 19 N. E. 714; *Hessing v. McClosky*, 37 Ill. 341; *McQuown v. Law*, 18 Ill. App. 34.

Ind.—*Jones v. Gott*, 10 Ind. 240.

Md.—*Washington Brewing Co. v. Carry* (1892), 24 Atl. 151.

Mich.—*Oliver, etc., Wire Co. v. Wheeler*, 106 Mich. 408, 64 N. W. 195.

Mo.—*Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212; *Pierce v. Lowder*, 54 Mo. App. 25; *State v. Excelsior Distilling Co.*, 20 Mo. App. 21.

Pa.—*Rahn v. McElrath*, 6 Watts, 151.

Tenn.—*Hickman v. Quinn*, 6 Yerg. 96.

Tex.—*Clark v. Bell* (Tex. Civ. App. 1905), 89 S. W. 38; *La Belle Wagon Works v. Tidball*, 69 Tex. 161, 6 S. W. 672; *Smith v. Whitfield*, 67 Tex. 124, 2 S. W. 822; *Noyes v. Sanger*, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Wis.—*Noyes v. Schnier*, 70 Wis. 224, 35 N. W. 310; *Gleason v. Day*, 9 Wis. 498.

Such a conveyance protects the vendee to the same extent as if there had been a new consideration, if taken in good faith and without intent to defraud the creditors of the vendor.⁹² But where a debtor makes a preferential transfer to a creditor in payment of a debt, not only must the indebtedness be *bona fide* but the payment must be a *bona fide* transaction.⁹³ Where the evidence of the indebtedness is insufficient,⁹⁴ or it appears that it was not recognized or acknowledged as a legal indebtedness or obligation by the parties, until the grantor was threatened with financial troubles or became insolvent,⁹⁵ the conveyance will not be sustained as against existing creditors. A pre-existing debt is a good and sufficient consideration for a conveyance or transfer of property by a debtor, either in payment or satisfaction of, or as security for, such debt, both as against creditors and subsequent purchasers.⁹⁶

Agreement to convey to grantor's wife.—A conveyance of real estate to the father-in-law of the grantor, in payment of a pre-existing debt, is not fraudulent as to other creditors, although made with the understanding that the property should be conveyed to the grantor's wife as a gift. *Smith v. Riggs*, 56 Iowa, 488, 8 N. W. 479, 9 N. W. 385.

Where note is given for excess in value over debt.—A purchase *bona fide* made by a creditor from his debtor, who is in failing circumstances, is not fraudulent simply because the consideration of the purchase is the debt due and a promissory note, *bona fide* given at the time, for an overplus in the price agreed to be paid above the debt due. *Hobbs v. Davis*, 50 Ga. 213.

92. *Starr v. Dow* (Neb. 1906), 108 N. W. 1065.

93. *Hulse v. Mershon*, 125 Ill. 52, 17 N. E. 50; *Morris v. Coombs*, 109 Ill. App. 176; *Edrington v. Rogers*, 15 Tex. 188; *Long v. Deposit Bank*, 28 Ky. L. Rep. 913, 90 S. W. 961.

94. *Tanner v. Eckhart*, 107 App. Div. (N. Y.) 79, 94 N. Y. Supp. 1013; *Walters v. Merrit Pants Co.* (Ark. 1905), 88 S. W. 879; *O'Kane v. Vin-nedge*, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551.

95. *Ashmead v. Baylor*, 59 N. J. Eq. 469, 45 Atl. 699; *Adoue v. Spencer*, 59 N. J. Eq. 231, 46 Atl. 543; *Fleischner v. Bank of McMinville*, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; *Mitchell v. Mitchell*, 42 S. C. 475, 20 S. E. 405.

96. N. Y.—*New York County Nat. Bank v. American Surety Co.*, 174 N. Y. 544, 67 N. E. 1086, *aff'd* 69 App. Div. 153, 74 N. Y. Supp. 692; *Seymour v. Wilson*, 19 N. Y. 417; *Pearson v. Cuthbert*, 58 App. Div. 395, 68 N. Y. Supp. 1031; *King v. Simmons*, 36 App. Div. 623, 55 N. Y. Supp. 173; *Commercial Bank v. Bolton*, 20 App. Div. 70, 46 N. Y. Supp. 734; *Columbus Watch Co. v. Hodenpyl*, 61 Hun, 557, 16 N. Y. Supp. 337; *Loeschigk v. Baldwin*, 1 Rob. 377; *Goff v. Alexander*, 20 Misc. Rep. 498, 45 N. Y. Supp. 737; *Fitts v. Beardsley*, 8 N. Y.

But the debt which constitutes the consideration must be an obligation for which the debtor is legally liable and which he could be compelled to pay by action.⁹⁷ A conveyance by a debtor to his creditor is voluntary and without consideration where no acquittance of the debt is given, and there is no consent or understanding that the conveyance is to discharge the debt,⁹⁸ and the transfer of

Supp. 567; *Ludlow v. Hurd*, 19 Johns. 218.

U. S.—*Conard v. Atlantic Ins. Co.*, 26 U. S. 386, 7 L. Ed. 189, *aff'g* 2 Fed. Cas. No. 627, 4 Wash. 662; *United States v. Coffin*, 33 Fed. 337.

Ala.—*Taylor v. Dwyer*, 131 Ala. 91, 32 So. 509; *Henderson v. Perryman*, 114 Ala. 647, 22 So. 24; *Harmon v. McRae*, 91 Ala. 401, 8 So. 548; *Turner v. McFee*, 61 Ala. 468.

Ark.—*Davis v. Jones*, 67 Ark. 122, 53 S. W. 301; *Smith v. Jones*, 63 Ark. 232, 37 S. W. 1052.

Cal.—*Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264.

Colo.—*Wellington v. Terry* (1906), 88 Pac. 467; *Beaman v. Stewart*, 19 Colo. App. 226, 74 Pac. 344; *Denver Jobbers' Assoc. v. Rumsey*, 19 Colo. App. 320, 71 Pac. 1001; *Krippendorf-Dittman Co. v. Trenoweth*, 16 Colo. App. 178, 64 Pac. 373; *Sargent v. Chapman*, 12 Colo. App. 529, 56 Pac. 194.

Del.—*Brown v. Dickerson*, 2 Marv. 119, 42 Atl. 421.

Fla.—*Mercantile Exch. Bank v. Taylor* (1906), 41 So. 22.

Ga.—*Davis v. Anderson*, 1 Ga. 176.

Ky.—*Jones v. Dulaney & Mitchell*, 27 Ky. L. Rep. 702, 86 S. W. 547.

Tex.—*Sparks v. Ponder* (Tex. Civ. App. 1906), 94 S. W. 428; *Riske v. Rotan Grocery Co.* (Tex. Civ. App. 1906), 93 S. W. 708.

⁹⁷ *N. Y.*—*Lippert v. Gilmartin*, 37 App. Div. 411, 55 N. Y. Supp.

1042; *Wilbur v. Fradenburgh*, 52 Barb. 474.

U. S.—*Knower v. Haines*, 31 Fed. 513, 24 Blatchf. 488.

Ala.—*British, etc., Mort. Co. v. Norton*, 125 Ala. 522, 28 So. 31; *Hubbard v. Allen*, 59 Ala. 283.

Cal.—*Fidelity, etc., Co. v. Thompson*, 128 Cal. 506, 61 Pac. 94.

Ill.—*Banton v. Smith*, 113 Ill. 481.

Ind.—*Hadley v. Hood*, 94 Ind. 119.

Iowa.—*Schoonover v. Foley* (1903), 94 N. W. 492; *Parriott v. Bowers*, 111 Iowa, 740, 82 N. W. 998; *Burlington Protestant Hospital Assoc. v. Gelingner*, 111 Iowa, 293, 82 N. W. 766.

Kan.—*Holyoke Envelope Co. v. Heagler* (App. 1901), 63 Pac. 450.

Me.—*Jose v. Hewett*, 50 Me. 248.

Pa.—*In re Hoover*, 12 Montg. Co., L. Rep. 113.

Wis.—*Livre v. Thielke*, 115 Wis. 389, 91 N. W. 975. *Compare* *First Nat. Bank v. Bertschky*, 52 Wis. 438, 9 N. W. 534.

Eng.—*Penhall v. Elwin*, 1 Smale & G. 258.

Including interest not collectible by law in a mortgage given for a just debt does not render it fraudulent, where the allowance of interest is just and equitable. *Spencer v. Ayrault*, 10 N. Y. 202; *Doty v. Clint*, 11 St. Rep. (N. Y.), 87.

⁹⁸ *Ames v. Dorroh*, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522; *Crecelius v. Bierman*, 72 Mo. App. 355.

property for antecedent debts, without extinguishment or surrender of such debts and of the old securities therefor, is not sufficient to constitute the transferee a *bona fide* purchaser for a valuable consideration.⁹⁹ The payment or securing of an actual debt by a debtor must be impeached by evidence tending to show, either some other advantage or benefit to the debtor beyond the discharge of his obligation, or some other benefit to the creditor beyond the mere payment of his debt, or some injury to the other creditors beyond the mere postponement to the debt preferred.¹ The surrender by the grantee of notes which he holds against the grantor is such a valuable consideration as will sustain it as against the grantor's other creditors,² unless the notes are in fact without consideration.³ A creditor's definitely extending the time for payment of a debt is a sufficient consideration for a mortgage and renders him a *bona fide* purchaser.⁴ A deed of trust made to secure a pre-existing debt in consideration of further indulgence for a year is not so unreasonable as to raise any presumption of an intent to hinder or delay creditors.⁵ A deed to one for whose wife the grantor held funds in trust for which he had not accounted, and which was made to satisfy the trust, cannot be regarded as a voluntary conveyance.⁶ Fraud cannot be attributed to a debtor

99. Wood v. Robinson, 22 N. Y. 564; In re Morse, 17 Fed. Cas. No. 9,851, 17 Blatchf. 72; Wellington v. Fuller, 38 Me. 61; Whitaker v. Sumner, 37 Mass. 399; Pope v. Pope, 40 Miss. 516; Harney v. Pack, 4 Sm. & M. (Miss.), 229; Oliver v. Moore, 23 Ohio St. 473; Starr v. Starr, 1 Ohio, 321. But see Westerly Sav. Bank v. Stillman Mfg. Co., 16 R. I. 497, 17 Atl. 918.

It is a badge of fraud for the grantee to retain the evidence of indebtedness in his possession uncanceled, when a conveyance, made in consideration of a pre-existing debt has been perfected. Gardner v. Broussard, 39 Tex. 372;

Webb v. Ingham, 29 W. Va. 389, 1 S. E. 816.

1. Meyers v. Meyers, 24 Pa. Super. Ct. (1904), 603; Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818.

2. Starin v. Kelly, 36 Super. Ct. (N. Y.), 366.

3. Neal v. Foster, 36 Fed. 29.

4. Snellgrave v. Evans (Ala. 1906), 40 So. 567. A mortgage given in consideration of the extension of a debt, and of the mortgagor being permitted to pay the debt in installments, is not necessarily void. U. S. Nat. Bank v. Westervelt, 55 Neb. 424, 75 N. Y. 857.

5. Lee v. Flanagan, 29 N. C. 471.

6. Irion v. Mills, 41 Tex. 310.

who sells his property for a fair consideration and applies the proceeds to the payment of *bona fide* creditors.⁷ A transfer of property to pay a loan is valid as against the vendor's creditors, although he had contracted to pay usurious interest, if the value of the property does not exceed the principal.⁸ The fact that fraud was practiced by an insolvent corporation in the use of money borrowed from a bank and loaned to it in good faith and without participation in the fraud, does not invalidate the corporation's transfer of its property in payment of the money borrowed.⁹ A mortgage executed by a fraudulent purchaser of goods, to secure antecedent creditors, will be held valid as to such creditors, where, in consideration of the mortgage and without notice of fraud, they extended the time of their debt or assumed any new or additional obligation.¹⁰ A worthless debt of a third person is not a valuable consideration for a conveyance,¹¹ and a transfer of partnership property in payment of an individual debt of one of the partners is void as to creditors of the partnership.¹²

§ 19. **Property in excess of debt.**—A debtor may pay his creditor in goods or other property; but if the property conveyed or transferred by a debtor to one of his creditors largely exceeds in value the amount of the debt in payment of which the conveyance or transfer is made, the conveyance is fraudulent as to other creditors and may be set aside by them.¹³ Where an insolvent debtor

7. *Pochel v. Read*, 20 App. Div. (N. Y.), 208, 46 N. Y. Supp. 775; *Farwell v. Norton*, 77 Ill. App. 685. Compare *Lehman v. Kelly*, 68 Ala. 192.

8. *McLendon v. Grice*, 119 Ala. 513, 24 So. 846; *Belknap v. Groover* (Tex. Civ. App. 1900), 56 S. W. 249.

9. *Ferguson v. Oxford Mercantile Co.* (Miss. 1900), 27 So. 877.

10. *Adam, etc., Co. v. Stewart*, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240.

11. *Seymour v. Wilson*, 19 N. Y. 417.

12. *Henderson v. Perryman*, 114 Ala. 647, 22 So. 24; *Leonard v. Winslow*, 2 Grant Cas. (Pa.), 139.

13. *N. Y.*—*First Nat. Bank of Amsterdam v. Miller*, 163 N. Y. 164, 57 N. E. 308, *revg.* 24 App. Div. 551, 49 N. Y. Supp. 981, where other attendant circumstances show fraudulent intent; *Hollis v. Drescher*, 46 App. Div. 151, 63 N. Y. Supp. 378.

Ala.—*Henderson v. Perryman*, 114 Ala. 647, 22 So. 24; *Moore v. Penn*, 95 Ala. 200, 10 So. 343.

Cal.—*Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497.

transfers to his creditor property of a value greatly in excess of the debt, in a state where transfers for the purpose of preferring one creditor to another are valid, the transfer is void at common law, as fraudulent as to creditors, with respect to the property transferred which is in excess of the value of the debt.¹⁴ Where a transfer to secure a preferred creditor conveys an unreasonable amount of property, or includes practically all of the debtor's property, the value of which is greatly in excess of the debt, and the pre-

Ga.—*Banks v. Clapp*, 12 Ga. 514; *Peck v. Lang*, 2 Ga. 1, 46 Am. Dec. 368. Compare *Carey v. Giles*, 10 Ga. 9.

Ill.—*Head v. Harding*, 166 Ill. 353, 46 N. E. 890, *aff'g* 62 Ill. App. 302.

Kan.—*Schram v. Taylor*, 51 Kan. 547, 33 Pac. 315, the property transferred must bear a just proportion to the amount of the debt sought to be paid.

La.—*Sattler v. Marino*, 30 La. Ann. 355; *Worrell v. Vickers*, 30 La. Ann. 202.

Mich.—*Steuben County Wine Co. v. Lee*, 127 Mich. 698, 87 N. W. 129; *Ryan v. Meyer*, 108 Mich. 638, 66 N. W. 667.

Mo.—*Hewitt v. Price*, 99 Mo. 666, 74 S. W. 414; *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275. But see *Alberger v. National Bank of Commerce*, 123 Mo. 313, 27 S. W. 657.

Neb.—*Ogg v. Schultz*, 61 Neb. 221, 85 N. W. 64; *Morse v. Steinrod*, 29 Neb. 108, 46 N. W. 922.

N. J.—*Clinton Hill Lumber, etc., Co. v. Strieby*, 52 N. J. Eq. 576, 29 Atl. 589, when conveyed without right of redemption. Compare *Brock v. Hudson County Bank*, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451; *Demarest v. Terhune*, 18 N. J. Eq. 532.

S. C.—*Fryer v. Bryan*, 2 Hill Eq. 56.

Tex.—*Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 583; *Oppenheimer v. Halff*, 68 Tex. 409, 4 S. W. 562; *Howerton v. Holt*, 23 Tex. 51; *Baylor v. Brown*, 3 Tex. Civ. App. 177, 21 S. W. 73.

W. Va.—*Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Knight v. Capito*, 23 W. Va. 639.

See *Inadequacy of consideration*, chap. VI, § 4, *supra*.

Compare *George v. Kimball*, 41 Mass. 234.

The assignment of a right of action of a speculative value is not fraudulent as to other creditors because its value is in excess of the debts secured. *Hutmacher v. Anheuser-Busch Brew. Assoc.*, 71 Ill. App. 154.

14. *Mitchell v. McKibbin*, 17 Fed. Cas. No. 9,666; *Jaroslawski v. Simon*, 3 Brewst. (Pa.), 37.

Excess in amount secured by trust deed.—Where there is more property included in a trust deed than is sufficient to satisfy all the debts secured by it, a pursuing creditor may file a bill, against all the parties interested, to have the trust closed and the property subjected, first to the payment of the trust debts, and the excess to the satisfaction of the complainant's debts. *Cornish v. Dews*, 18 Ark. 172.

ferred creditor has knowledge of the insolvency of the debtor, it will be deemed fraudulent as to creditors whose claims are thereby defeated.¹⁵ A slight excess in the value of the property conveyed over the amount of the debt paid or secured does not, however, show inadequacy of consideration sufficient to evince a fraudulent purpose and to justify the setting aside of the conveyance as a fraudulent transfer.¹⁶ In such cases the law allows room for ordinary differences of opinion and will not weigh the estimates of opinion in too exacting a balance.¹⁷ In the absence of circumstances showing insolvency or bad faith, a mortgage or a trust conveyance or other transfer, made for the security of a pre-existing debt, will not be invalid for the reason that the property conveyed is much larger in value than the debt which it is given to secure.¹⁸ Where the value of the property included in such a con-

15. *Williams v. Stowell*, 5 Kan. App. 880, 48 Pac. 894; *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275; *Oppenheimer v. Halff*, 68 Tex. 409, 4 S. W. 562; *Edrington v. Rogers*, 15 Tex. 188; *Thompson v. Rosenstein* (Tex. Civ. App. 1902), 67 S. W. 439; *Halff v. Goldfrank* (Tex. Civ. App. 1899), 49 S. W. 1095.

16. *N. Y.*—*Laidlaw v. Gilmore*, 47 How. Pr. 67.

U. S.—*Rapauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 948, 42 C. C. A. 106.

Ala.—*Redd v. Wallace* (1906), 40 So. 407.

Iowa.—*Warfield v. Lynd*, 67 Iowa, 722, 25 N. W. 896; *Rusie v. Jameson*, 62 Iowa, 52, 17 N. W. 103.

Kan.—*Wilhite v. Daniels* (1902), 67 Pac. 452.

Mo.—*Scott Hardware Co. v. Riddle*, 84 Mo. App. 275.

Neb.—*Chamberlain v. Woolsey*, 66 Neb. 141, 92 N. W. 181, 95 N. W. 38.

Pa.—*Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *Hand v. Hitner*, 140

Pa. St. 166, 21 Atl. 260, where the property was real estate upon which an arbitrary value was placed; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57.

Tenn.—*McGrew v. Hancock* (Ch. App. 1899), 52 S. W. 500.

Tex.—*Davis v. Beason*, 77 Tex. 604, 14 S. W. 198.

17. *Fargerson v. Hall*, 99 Ala. 209, 13 So. 302; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137, 18 Am. St. Rep. 137, 9 L. R. A. 645.

18. *N. Y.*—*Boessneck v. Cohn*, 7 N. Y. Supp. 620.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Downs v. Kissam*, 10 How. 102, 13 L. Ed. 346.

D. C.—*Birdsall v. Welch*, 6 D. C. 316.

Iowa.—*Ward v. Parker*, 128 Iowa, 124, 103 N. W. 104.

Kan.—*Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961.

Mich.—*Michigan Trust Co. v. Bennett*, 106 Mich. 381, 64 N. W. 330;

veyance is greatly in excess of the debt secured a presumption of fraud may be raised,¹⁹ but fraud will not be indisputably presumed from the mere taking of excessive security, although it is a circumstance to be considered by the court or jury in determining whether a transaction was in fraud of creditors.²⁰

§ 20. Amount secured in excess of actual debt.—The mere fact that a mortgage or other conveyance, given by an insolvent

Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721.

Miss.—Taylor v. Walkins (1893), 13 So. 811.

Neb.—Kilpatrick-Koch Dry Goods Co. v. Strauss, 45 Neb. 793, 64 N. W. 223; Grand Island Banking Co. v. Costello, 45 Neb. 119, 63 N. W. 376; Sherwin v. Gaghagen, 39 Neb. 238, 57 N. W. 1005; Grimes v. Farrington, 19 Neb. 44, 26 N. W. 618.

N. C.—Burgin v. Burgin, 23 N. C. 453.

Tenn.—Roane v. Bank of Nashville, 38 Tenn. 526.

Wis.—Cunningham v. Eagan, 102 Wis. 272, 78 N. W. 402; Menzesheimer v. Kennedy, 75 Wis. 411, 44 N. W. 508.

Stipulation to delay foreclosure.—A mortgage of nearly all the debtor's estate to a principal creditor, fifty per cent. more in value than the debt secured, with a stipulation for two years' delay in its foreclosure, is void. Reynolds v. Welch, 47 Ala. 200.

Mortgage held to be an invalid assignment.—A finding that a mortgage of land was as invalid assignment by the mortgagor of his property to one creditor to the exclusion of other creditors, will not be disturbed where it appears that the mortgage covered all the mortgagor's

land, and, with other mortgages on the land, amounted to over seven-eighths of its value, and there was no other property out of which creditors could collect their claims. Mitchell v. Mitchell, 42 S. C. 475, 20 S. E. 405.

Several chattel mortgages executed simultaneously to secure debts, the aggregate of which is not unreasonably less than the property mortgaged, are not void because no one of such debts is in itself sufficient to justify so great a security. Jones v. Loree, 37 Neb. 816, 56 N. W. 390.

19. Williams v. Stowell, 5 Kan. App. 880, 48 Pac. 894; Crosby v. Huston, 1 Tex. 203. Compare Black Hills Mercantile Co. v. Gardner, 5 S. D. 246, 58 N. W. 557.

20. Tackaberry v. Gilmore, 57 Neb. 450, 78 N. W. 32; Dayton Spice Mills v. Sloan, 49 Neb. 622, 68 N. W. 1040; Kilpatrick-Koch Dry Goods Co. v. Strauss, 45 Neb. 793, 64 N. W. 223 (*distinguishing* Thompson v. Richardson Drug Co., 33 Neb. 714, 50 N. W. 948, 29 Am. St. Rep. 505; Brown v. Work, 30 Neb. 800, 47 N. W. 192; Morse v. Steinrod, 29 Neb. 108, 46 N. W. 922); Grand Island Banking Co. v. Costello, 45 Neb. 119, 63 N. W. 376; Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Neb. 863, 62 N. W.

debtor as security for a debt, is given for a greater sum than is actually due on the debt secured, is not conclusive evidence of fraud.²¹ But a mortgage or other conveyance executed by a debtor who is insolvent or in failing circumstances, as security for a debt, for a sum known by the creditor at the time to be in excess of what is actually due on the debt, is presumptively fraudulent.²² A miscalculation, mistake, or unintentional error

1105; Kilpatrick-Koch Dry Goods Co. v. McPheely, 37 Neb. 800, 56 N. W. 389; Menzesheimer v. Kennedy, 75 Wis. 411, 44 N. W. 508.

21. *U. S.*—United States v. Griswold, 8 Fed. 496, 7 Sawy. 296.

Ill.—Bell v. Prewitt, 62 Ill. 361; Wooley v. Fry, 30 Ill. 158.

Ind.—Adams v. Laugel, 144 Ind. 608, 42 N. E. 1017; Goff v. Rogers, 71 Ind. 459.

Iowa.—Van Patten v. Thompson, 73 Iowa, 103, 34 N. W. 763; Wood v. Scott, 55 Iowa, 114, 7 N. W. 465.

Kan.—Bowling v. Searles, 57 Kan. 174, 45 Pac. 584; Bush v. Bush, 33 Kan. 556, 6 Pac. 794; Hughes v. Shull, 33 Kan. 127, 133, 5 Pac. 414, 770.

Mass.—Parker v. Barker, 43 Mass. 423.

Mich.—Louden v. Vinton, 108 Mich. 313, 66 N. W. 222; Willison v. Desenberg, 41 Mich. 156, 2 N. W. 201.

Minn.—Heim v. Chapel, 62 Minn. 338, 64 N. W. 825; Berry v. O'Connor, 33 Minn. 29, 29 N. W. 840, nor the fact that its condition fails to describe the real character of the indebtedness or liability intended to be secured.

Neb.—Smith v. Bowen, 51 Neb. 245, 70 N. W. 949.

N. H.—Whittredge v. Edmonds, 63 N. H. 248.

Pa.—Gordon v. Preston, 1 Watts, 385, 26 Am. Dec. 75.

Tenn.—Bumpas v. Dotson, 26 Tenn. 310, 46 Am. Dec. 81.

Wis.—Barkow v. Sanger, 47 Wis. 500, 3 N. W. 16. But see Butts v. Peacock, 23 Wis. 359.

22. *U. S.*—Hart v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548; Kellogg v. Clyne, 54 Fed. 696, 12 U. S. App. 174, 4 C. C. A. 554; Hubbard v. Turner, 12 Fed. Cas. No. 6,819, 2 McLean, 519.

Ala.—Marriott v. Givens, 8 Ala. 694; Stover v. Herrington, 7 Ala. 142, 41 Am. Dec. 86.

Ark.—Henry v. Harrell, 57 Ark. 569, 22 S. W. 433.

Cal.—Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Wiscoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66.

Conn.—Bramhall v. Flood, 41 Conn. 68.

Ill.—Adams v. Pease, 113 Ill. App. 356.

Iowa.—Bussard v. Bullitt, 95 Iowa, 736, 64 N. W. 658; Taylor v. Wendling, 66 Iowa, 562, 24 N. W. 40; Lombard v. Dows, 66 Iowa 243, 23 N. W. 649; City of Davenport v. Cummings, 15 Iowa, 219.

Kan.—Williams v. Stowell, 5 Kan. App. 880, 48 Pac. 894.

Mich.—Patrick v. Riggs, 105 Mich. 616, 63 N. W. 532; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Showman v. Lee, 86 Mich. 556, 45 N. W. 578; King v. Hubbell, 42 Mich. 597, 4 N. W. 440.

in the amount of the debt secured by a mortgage or other conveyance will not vitiate such a conveyance.²³ It must appear

Minn.—Hanson v. Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

Mo.—First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; Imhoff v. McArthur, 148 Mo. 371, 48 S. W. 456. But see Colbern v. Robinson, 80 Mo. 541.

N. J.—Heintze v. Bently, 34 N. J. Eq. 562, *aff'd* 33 N. J. Eq. 405.

Pa.—Orr v. Peters, 197 Pa. St. 606, 47 Atl. 849; Whiting v. Johnson, 11 Serg. & R. 328, 14 Am. Dec. 633; Hieber v. Neary, 7 Pa. Dist. 596. But see Heiney v. Anderson, 9 Lanc. Bar 13.

S. C.—Hipp v. Sawyer, 1 Rich. Eq. Cas. 410. *Compare* Smith v. Pate, 3 S. C. 204.

Wis.—Rice v. Morner, 64 Wis. 599, 25 N. W. 668; Stein v. Hermann, 23 Wis. 132.

Where exact amount of debt was not known.—The giving of a note and mortgage by an insolvent for an amount larger than he really owes is not a fraud on his other creditors, where it appears that neither he nor the mortgagee knew accurately the amount due, which embraced mutual dealings for a series of years; that it was agreed that the mortgage should secure only the sum actually due; and that there was no intent to defraud other creditors. *Lycoming Rubber Co. v. King*, 90 Iowa, 343, 57 N. W. 864. See also *Wood v. Scott*, 55 Iowa, 114, 7 N. W. 465; *Davis v. Charles*, 8 Pa. St. 82.

Where value of property was less than actual debt.—The execution of a deed of trust to secure a

debt of three thousand dollars, when only about half that amount is due, does not show the deed to be fraudulent as to other creditors, where the value of the land is but \$650. *Sawyer v. Bradshaw*, 125 Ill. 440, 17 N. E. 812.

A deed intended as a mortgage which expresses a consideration largely in excess of the debt will be viewed by the court with suspicion, and the evidence of good faith and absence of fraudulent intent as against contesting creditors must be full and satisfactory; but such a conveyance is not constructively fraudulent. *Jefferson County Bank v. Hummel*, 11 Colo. App. 337, 53 Pac. 286. See also *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786; *Ross v. Duggan*, 5 Colo. 85.

Where debt and future advances equal amount of mortgage.—Chattel mortgages are not fraudulent as purporting to secure a debt larger than the actual debt and future advances, where the agreement was that the remainder of the money was to be advanced substantially at once. *Bradley Co. v. Paul*, 94 Wis. 488, 69 N. W. 168.

23. *Ala.*—Pennington v. Woodall, 17 Ala. 685.

Kan.—Symns Grocer Co. v. Lee, 9 Kan. App. 574, 58 Pac. 237.

Mo.—Rogers, etc., Hardware Co. v. Randell, 69 Mo. App. 342.

Neb.—Trompen v. Yates, 66 Neb. 525, 92 N. W. 647.

Pa.—Baldwin v. Harron, 19 Pa. Co. Ct. 634.

Tex.—Freybe v. Tiernan, 76 Tex. 286, 13 S. W. 370.

that it was so taken intentionally, and not by mere mistake, in computation or otherwise.²⁴

§ 21. **Debts not yet due.**—A conveyance of property at a fair valuation by a failing debtor to his creditor, in payment of a subsisting and honest debt, which has not yet matured, is not fraudulent in respect to his other creditors.²⁵ The fact that notes on which judgment was confessed were not due, or the cause of action had not matured, is not sufficient to show that a confession of judgment was fraudulent.²⁶ Where the property conveyed by a debtor to a creditor greatly exceeds the amount of his claim, and the claim is not yet due, the conveyance will be held to be fraudulent and void as to creditors.²⁷

§ 22. **Debts barred by limitation.**—The fact that the recovery of a debt, alleged to be the consideration of a conveyance, was barred by the statute of limitations when the conveyance was made, does not affect the sufficiency of the consideration, or render the conveyance void as against creditors.²⁸ Only the

24. *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.

25. *Bedell v. Chase*, 34 N. Y. 386; *Symns Grocer Co. v. Smith*, 6 Kan. App. 258, 51 Pac. 803; *Shedd v. Bank of Brattleboro*, 32 Vt. 709; *McGrew v. Hancock* (Tenn. Ch. App. 1899), 52 S. W. 500. *Contra.*—*Taaffe v. Josephson*, 7 Cal. 352, such a conveyance is constructively fraudulent; *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999.

26. *Pond v. Davenport*, 45 Cal. 225; *East Side Bank v. Columbus Tanning Co.*, 15 Pa. Co. Ct. 357.

27. *Lee v. Wathen*, 42 Ky. 297; *Brown v. Work*, 30 Neb. 800, 47 N. W. 192; *Hartman v. Allen*, 77 Tenn. 657.

28. *N. Y.*—*Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am.

St. Rep. 816; *McConnell v. Barber*, 86 Hun, 360, 33 N. Y. Supp. 480; *Del Valle v. Hyland*, 76 Hun, 493, 27 N. Y. Supp. 1059; *Davis v. Howard*, 73 Hun, 347, 26 N. Y. Supp. 194; *Mellen v. Banning*, 72 Hun, 176, 25 N. Y. Supp. 542; *Ellis v. Myers*, 8 N. Y. Supp. 139, 4 Silv. 323.

U. S.—*Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16; *Wilson v. Jones*, 76 Fed. 484, when part of debts were barred by the statute of limitations.

Ga.—*Comer v. Allen*, 72 Ga. 1, mortgage by husband to wife.

Iowa.—*Roberts v. Brothers*, 119 Iowa, 309, 93 N. W. 289; *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. 35, transfer by husband to wife.

Kan.—*Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606.

debtor himself can take advantage of the statute under such circumstances, and he is not obliged by any duty he owes his other creditors to interpose the statute of limitations as a defence.²⁹ But the fact that the consideration of the conveyance was a debt barred by limitation is a circumstance which may be considered in determining the question of good faith,³⁰ although it is not controlling or conclusive.³¹ A judgment by confession for a debt barred by the statute of limitations, or founded on an obligation not enforceable under the statute of frauds, is valid as against other creditors.³²

§ 23. Taking additional security for debts amply secured.—
A mortgage executed by an insolvent or one greatly in debt,

Minn.—Frost v. Steele, 46 Minn. 1, 48 N. W. 413.

Mo.—Gentry v. Field, 143 Mo. 399, 45 S. W. 286.

Neb.—Plummer v. Rohman, 61 Neb. 61, 84 N. W. 600, 62 Neb. 145, 87 N. W. 11; Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N. W. 1040.

S. C.—Leake v. Anderson, 43 S. C. 448, 21 S. E. 439; McPherson v. McPherson, 21 S. C. 261.

Tex.—Meyer Bros. Drug Co. v. Rather (Civ. App. 1895), 30 S. W. 812; Pierce v. Winberly, 78 Tex. 187, 14 S. W. 454, conveyance by father to son.

Va.—Robinson v. Bass, 100 Va. 190, 40 S. E. 660.

Loan by wife to husband.—Neither the statute of limitations nor the presumption of payment arising from lapse of time applies to a loan made by wife to her husband, so as to render fraudulent a conveyance by the husband preferring her. Dice v. Irvin, 110 Ind. 561, 11 N. E. 488. The statute of limitations does not run against a wife upon a debt due from her husband. Beliot Second Nat.

Bank v. Merrill, etc., Iron Works, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877.

29. Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; Ellis v. Myers, 54 Hun (N. Y.), 638, 8 N. Y. Supp. 139; Kennedy v. Powell, 34 Kan. 22, 7 Pac. 606, the debtor is not compelled to resort to this defense, nor can his other creditors interfere and insist upon it for him.

30. McConnell v. Barber, 88 Hun (N. Y.), 360, 33 N. Y. Supp. 480; Vansickle v. Wells, Fargo & Co., 105 Fed. 16; Sturm v. Chalfant, 38 W. Va. 248, 18 S. E. 451; Kanawha Valley Bank v. Atkinson, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806.

31. McConnell v. Barber, *supra*; French v. Motley, 63 Me. 326.

32. Keen v. Kleckner, 42 Pa. St. 529. Judgment notes or bonds, given by a son-in-law to his father-in-law for debts upon which the statute of limitations had run, are in fraud of creditors, within the meaning of the Virginia Code. Crawford v. Crawford, 4 W. Va. 56.

and purporting to secure a debt already amply secured, will be considered fraudulent as to creditors.³³ A secret transfer of choses in action, made by a creditor after the execution of a deed of trust for his benefit, with intent to give him additional security, is fraudulent as to other creditors.³⁴ But a creditor may take any number of securities for the payment of a debt, without subjecting himself or the debtor to suspicion, if the latter be solvent, and if insolvent, without exciting just suspicion, unless the securities are excessive, indicating a purpose to shield the property of the debtor from the reach of other creditor.³⁵

§ 24. Conveyance in execution of prior valid agreement.—

Where a deed is executed in pursuance of a prior parol agreement, made for a valuable consideration, the payment of the consideration creates a trust by implication, and renders the conveyance in accordance with such trust agreement valid as against creditors of the grantor.³⁶ Where a final agreement, on a valuable consideration, is made to convey lands, and it is carried into effect by giving a deed, the consideration for the agreement is to be deemed the consideration for the deed, and, if sufficient, will support it as against creditors.³⁷

33. *Lombard v. Dows*, 66 Iowa, 243, 23 N. W. 649, a mortgage for advances made and to be made where the mortgagee did not obligate himself to make any future advances and past advances were already amply secured; *Crapster v. Williams*, 21 Kan. 109; *Jaffray v. Wolf*, 4 Okla. 303, 47 Pac. 496.

34. *Reeves v. John*, 95 Tenn. 434, 32 S. W. 312.

35. *Hendon v. Morris*, 110 Ala. 106, 20 So. 27.

36. *Norton v. Mallory*, 63 N. Y. 434, *aff'd* 1 Hun (N. Y.), 499; *Billsborrow v. Titus*, 15 How. Pr. (N. Y.) 95, deeds given in pursuance of a

prior parol partition, fully carried into effect by each party taking possession of his allotted share; *Gottstein v. Wist*, 22 Wash. 581, 61 Pac. 715, the grantor having executed the deed in satisfaction of a legal obligation, could not question its validity, and his creditors can occupy no better position.

37. *Pulte v. Geller*, 47 Mich. 560, 11 N. W. 385. See also *Mundy v. Mason*, 67 Ky. 339. Compare *Zimmerman v. Bannon*, 101 Wis. 407, 77 N. W. 735, where the alleged agreement was one upon which the debtor making the conveyance did not appear to have been liable.

§ 25. Marriage as consideration for antenuptial settlement.—A conveyance, the consideration of which is marriage, is not a voluntary conveyance.³⁸ Marriage being the highest consideration known to the law,³⁹ an antenuptial conveyance or settlement of property made in consideration of marriage is upon a good and valuable consideration, and is valid as against creditors of the grantor.⁴⁰ Marriage is a valid consideration sufficient to

38. *Toulmin v. Buchanan*, 1 Stew. (Ala.) 67; *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; *Bonser v. Miller*, 5 Or. 110; *La Prince v. Guillemot*, 1 Rich. Eq. (S. C.) 187; *Moore's Adm'r v. Dawney*, 3 Hen. & M. (Va.) 127. Compare *Lionberger v. Baker*, 88 Mo. 447, *aff'd* 14 Mo. App. 353; *Davidson v. Graves*, *Riley Eq.* (S. C.) 219.

39. *Magniac v. Thomson*, 32 U. S. 348, 8 L. Ed. 709, *aff'd* 16 Fed. Cas. No. 8,956; *Johnston v. Dilliard*, 1 Bay (S. C.), 232.

40. *N. Y.*—*De Hierapolis v. Reilly*, 44 App. Div. 22, 60 N. Y. Supp. 417, *aff'd* 168 N. Y. 585, 60 N. E. 1110; *Wright v. Wright*, 59 Barb. 505, *aff'd* 54 N. Y. 437; *Verplank v. Sterry*, 12 Johns. 536, 7 Am. Dec. 348; *Sterry v. Arden*, 1 Johns. Ch. 261.

Ala.—*Nance v. Nance*, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; *Andrews v. Jones*, 10 Ala. 400.

Cal.—*Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; *Peck v. Peck*, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

Conn.—*Sanford v. Atwood*, 44 Conn. 141.

Ga.—*Bradley v. Saddler*, 54 Ga. 681; *Vason v. Bell*, 53 Ga. 416.

Ill.—*McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Campbell, etc., Co. v. Ross*, 86 Ill. App. 356, *aff'd* 187 Ill. 553, 58 N. E. 596.

Ind.—*Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *State v. Osborn*, 143 Ind. 671, 42 N. E. 921.

Ky.—*Sanders v. Miller*, 79 Ky. 517, 42 Am. Rep. 237.

Me.—*Tolman v. Ward*, 86 Me. 305, 29 Atl. 1081, 41 Am. St. Rep. 556.

Md.—*Albert v. Winn*, 5 Md. 66; *Betts v. Union Bank*, 1 Harr. & G. 175, 18 Am. Dec. 283.

Mass.—*Clark v. McMahon*, 170 Mass. 91, 48 N. E. 939.

Miss.—*Armfield v. Armfield*, 4 Freem. 311; *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. 206, decided under the Mississippi law.

Mo.—*Ploss v. Thomas*, 6 Mo. App. 157.

Ohio.—*Henry v. Henry*, 27 Ohio St. 121.

Or.—*Bonser v. Miller*, 5 Or. 110.

Pa.—*Provident Life, etc., Co. v. Fidelity Ins. Trust, etc., Co.*, 203 Pa. St. 82, 52 Atl. 34; *Appeal of Jones*, 62 Pa. St. 324; *Appeal of Frank*, 59 Pa. St. 190; *Ethridge v. Dunshee*, 31 Pittsb. L. J. 39.

S. C.—*Rivers v. Thayer*, 7 Rich. Eq. 136; *Ramsay v. Richardson*, *Riley Eq.* 271; *Tunno v. Trezevant*, 2 Desauss. 264.

Tenn.—*Cains v. Jones*, 13 Tenn. 249.

Vt.—*Pierce v. Harrington*, 58 Vt. 649, 7 Atl. 462.

Va.—*Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Noble v. Davies*

sustain a conveyance made with intent on the part of the grantor to defraud his creditors, unless knowledge on the part of the grantee of such fraudulent intent is alleged and proven. But a marriage settlement cannot be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement.⁴¹ A conveyance to a woman in consideration

(1887), 4 S. E. 206; *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405; *Bentley v. Harris*, 2 Gratt. 357; *Coutts v. Greenhow*, 2 Munf. 363, 5 Am. Dec. 472, *rev'g* 4 Hen. & M. 485. By statute, conveyances in consideration of marriage are now void as to existing creditors. Va. Code, § 2459; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

W. Va.—*Bogges v. Richards* Adm'r, 39 W. Va. 567, 20 S. E. 599, 45 Am. St. Rep. 938, 26 L. R. A. 537.

Eng.—*Barrow v. Barrow*, 2 Dick. 504, 21 Eng. Reprint, 365; *Campion v. Cotton*, 17 Ves. Jr. 263, 34 Eng. Reprint, 102; *Nairne v. Prowse*, 6 Ves. Jr. 752, 6 Rev. Rep. 37, 31 Eng. Reprint, 129.

Can.—*Ryland v. Almutt*, 11 Grant Ch. (U. C.) 135. Compare *Turgeon v. Shannon*, 20 Quebec Super. Ct. C. S. 135.

See Rights of grantee under marriage settlement, chap. XIV, § 41, *infra*.

In Louisiana a donation *propter nuptias* by the husband, comprising all his property, of a value less in amount than that of a judgment entered up against him, will be regarded as in fraud of creditors. *Harmon v. Ryan*, 10 La. Ann. 661. A donation *propter nuptias* could not, by the Spanish law or the Code of 1808, be made to the prejudice of creditors. *Cable v. Coe*, 4 La. 554; *Mercer v. Andrews*, 2 La. 538.

A deed of trust to secure a pre-existing voluntary bond, executed by a father to his daughter payable on her marriage, the father being wealthy and unembarrassed at the time of the execution of the bond, but insolvent at the time the deed is executed, is valid against creditors becoming such after the marriage of the daughter. *Welles v. Cole*, 6 Gratt. (Va.) 645.

Where property is settled upon a wife for her life, with remainder over to the sister of the grantor and her children, the remainder is without valuable consideration and void as to creditors whose claims existed at the time of the settlement. *Bumgardner v. Harris*, 92 Va. 188, 22 S. E. 229.

The trustees of a marriage settlement are purchasers for a valuable consideration. In re *Donnan* (1902), 1 Ir. 109.

After-acquired property.—A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not too vague and uncertain to be enforced. In re *Reis*, 73 L. J. K. B. 929 (1904), 2 K. B. 769, 91 Law T. 592, 53 Wkly. Rep. 122, 11 Manson, 229, 20 T. L. R. 547.

41. U. S.—*Prewett v. Wilson*, 103 U. S. 22, 26 L. Ed. 360, *rev'g* 30 Fed. Cas. No. 17,828, 3 Woods, 631.

of her marrying the grantor is void as against his creditors, if she knows that his remaining property is not sufficient to satisfy their claims, but is valid against creditors of the grantor, notwithstanding the insolvency of the latter, unless the grantee has notice of such insolvency.⁴² The fact that the conveyance transfers the whole property of the grantor is sufficient to charge the grantee with notice of fraud.⁴³ Where a party promises to marry in good faith and for a consideration, he or she is entitled to the consideration for such a promise, and if, without fault upon his or her part, the marriage does not take place, it does

Cal.—Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

Ga.—Comer v. Allen, 72 Ga. 1.

Ind.—State v. Osborne, 143 Ind. 761, 42 N. E. 921; Bunnell v. Witherow, 29 Ind. 123.

Me.—Gibson v. Bennett, 79 Me. 302, 9 Atl. 727.

Mass.—Clark v. McMahon, 170 Mass. 91, 48 N. E. 939.

Or.—Bonser v. Miller, 5 Or. 110.

Pa.—Appeal of Frank, 59 Pa. St. 190.

R. I.—National Exch. Bank v. Watson, 13 R. I. 91, 43 Am. Rep. 132.

W. Va.—Dent v. Pickens, 46 W. Va. 378, 33 S. E. 303.

Can.—Commercial Bank v. Cooke, 9 Grant Ch. (U. C.) 524; Thompson v. Gore, 12 Ont. 651.

Eng.—Bulmer v. Hunter, L. R. 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. Rep. N. S. 942; Wheeler v. Caryl, Ambl. 121, 27 Eng. Reprint, 79; Rasher v. Thompson, 1 Giff. 49, 5 Jur. N. S. 669, 7 Wkly. Rep. 607; Campion v. Cotton, 17 Ves. Jr. 271, 34 Eng. Reprint, 102; Kirk v. Clark, Prec. Ch. 275, 24 Eng. Reprint, 133; Columbine v. Penhall, 1 Smale & G. 228; Wenman v. Lyon, 1 Q. B. 634, 64 L. T. Rep. N. S. 88, 39 Wkly. Rep. 301, *aff'd* 2 Q. B. 192, 60 L. J. Q. B.

663, 65 L. T. Rep. N. S. 136, 39 Wkly. Rep. 519.

Participation in fraud avoids settlement.—Where a man executed an ante-nuptial settlement and married a woman with whom he had an immoral intimacy, and the evidence showed that such marriage was entered into solely with intent to defraud his creditors, the wife being implicated in the transaction, the settlement was fraudulent and void as against creditors. *Re Pennington*, 59 L. T. Rep. N. S. 774, 5 Morr. Bankr. Cas. 216, *aff'd* 5 Morr. 268. See Effect of knowledge or notice where transfer is to one not a creditor, chap. XIII, § 6, *infra*.

42. *Keep v. Keep*, 7 Abb. N. Cas. (N. Y.) 240; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617. See also Indebtedness or insolvency of grantor, chap. VII, *supra*. Knowledge and intent of grantee when transfer is for valuable consideration, chap. XIII, § 4, *infra*.

43. *McGowan v. Hitt*, 16 S. C. 602, 42 Am. Rep. 650; *Simpson v. Graves*, *Riley Eq. (S. C.)* 232; *Croft v. Arthur*, 3 Desauss. (S. C.) 223. See Badges of fraud. Transfer of all of debtor's property, chap. VI, § 8, *supra*.

not affect the title to the consideration.⁴⁴ Where a man conveys land to a woman on promise of marriage by her, she can hold the same against his creditors, although the marriage is prevented by death.⁴⁵ A deed made in consideration of marriage is valid, as against existing creditors of the grantor, although not delivered until after the marriage is consummated, in the absence of bad faith on the part of the wife.⁴⁶ An ante-nuptial settlement, securing the future earnings of the wife to her sole use, would be fraudulent, even in respect to future creditors.⁴⁷

§ 26. **Effect of marriage on prior voluntary conveyance.**—Where there is a voluntary conveyance, not actually fraudulent, in the hands of the grantee, if a subsequent marriage takes place and the conveyance forms any inducement to the marriage, it is confirmed by the subsequent marriage and becomes a conveyance for a valuable consideration sufficient to render it valid, not only as against a subsequent purchaser, but also against the creditors of the grantor.⁴⁸ But the rule that marriage constitutes a good and valuable consideration does not apply where a voluntary conveyance is made by a father to his child, who afterwards marries, unless it appears affirmatively that the marriage was induced, wholly or in part, by the conveyance.⁴⁹

§ 27. **Conveyance after marriage in accordance with ante-nuptial agreement.**—A post-nuptial settlement, or a conveyance from a husband to his wife pursuant to an antenuptial settle-

44. *De Hierapolis v. Reilly*, 44 App. Div. (N. Y.) 22, 60 N. Y. Supp. 417.

45. *Smith v. Allen*, 87 Mass. 454, 81 Am. Dec. 758.

46. *Wood & Huston Bank v. Read*, 131 Mo. 553, 33 S. W. 176.

47. *Keith v. Woombell*, 25 Mass. 211. See *Wages or earnings of debtor's wife*, chap. IV, § 9, *supra*.

48. *Wood v. Genet*, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; *Whelan v.*

Whelan, 3 Cow. (N. Y.) 537; *Verplank v. Sterry*, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261; *Huston's Heirs v. Cantril*, 11 Leigh (Va.), 136; *Guardian Assur. Co. v. Avonmore*, Ir. R. 6 Eq. 396.

49. *Whelan v. Whelan*, 3 Cow. (N. Y.) 537; *Stokes v. Jones*, 18 Ala. 734; *O'Brien v. Coulter*, 2 Blackf. (Ind.) 421.

ment, is valid, even as against creditors or purchasers, if it is made in pursuance of a valid agreement entered into before marriage.⁵⁰ But under statutes requiring agreements in consideration of marriage to be in writing and signed by the parties, a conveyance of land, the only consideration for which was the promise to marry, though the marriage takes place, is invalid as against the existing creditors of the grantor.⁵¹ Marriage is not such a part performance of an oral ante-nuptial contract, the sole consideration of which is marriage, as to take it out of the operation of the statute of frauds, and the contract cannot be specifically enforced in a court of equity; and, therefore, such an ante-nuptial agreement is not a sufficient consideration to sustain a conveyance from the husband to the wife after marriage, as against the creditors of the former.⁵²

50. U. S.—*Magniac v. Thompson*, 32 U. S. 348, 8 L. Ed. 709, *aff'd* 16 Fed. Cas. No. 8,956.

Ala.—*Nance v. Nance*, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378; *Lockwood v. Nelson*, 16 Ala. 294.

Ind.—*Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *Clow v. Brown* (Ind. App. 1904), 72 N. W. 534.

Ky.—*Sanders v. Miller*, 79 Ky. 517, 42 Am. Rep. 237; *Kinnard v. Daniel*, 52 Ky. 496.

Va.—*Dabney v. Kennedy*, 7 Gratt. 317.

Wyo.—*Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857; *North Platte Milling, etc., Co. v. Price*, 4 Wyo. 293, 33 Pac. 664.

Eng.—*Brunsdon v. Stratton*, Prec. Ch. 520, 24 Eng. Reprint, 233. *Compare Battersby v. Farrington*, 1 Swanst. 106, 36 Eng. Reprint, 317, 1 Wils. Ch. 88, 37 Eng. Reprint, 40, 18 Rev. Rep. 32. *Compare Bank of South Carolina v. Mitchell*, Rice Eq. (S. C.) 389, a deed of marriage settlement executed previous to mar-

riage, which was never recorded, is not a sufficient consideration as against subsequent creditors.

An ante-nuptial settlement which was extinguished, by agreement between all the parties interested under it after the marriage, and the property named in it divided and delivered, cannot constitute a consideration for a subsequent conveyance by the husband to the wife of the property received by him under such division. *Harper v. Scott*, 12 Ga. 125.

Where a greater interest in the property is secured to the wife than was provided for in the marriage articles, by a post-nuptial settlement, it is void as against creditors. *Saunders v. Ferrill*, 23 N. C. 97.

51. Dygert v. Remerschnider, 32 N. Y. 629, *aff'd* 39 Barb. (N. Y.) 417; *Lamb v. Lamb*, 18 App. Div. (N. Y.) 250, 46 N. Y. Supp. 219; *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810.

52. N. Y.—*Hunt v. Hunt*, 171 N.

§ 28. **Post-nuptial settlements.**—A post-nuptial settlement upon or conveyance to a husband or wife, made without a valuable consideration and not in pursuance of a valid ante-nuptial agreement, is a mere voluntary conveyance, and void as to prior creditors of the grantor;⁵³ but a post-nuptial voluntary settlement by a

Y. 296, 64 N. E. 159, 59 L. R. A. 306, *aff'g* 55 App. Div. 430, 66 N. Y. Supp. 957; Whyte v. Denike, 53 App. Div. 320, 65 N. Y. Supp. 577; Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520; Wickes v. Clarke, 3 Edw. Ch. 58.

Recovery by trustee in bankruptcy.—A conveyance by an insolvent to his wife of a large amount of house furnishings bought on credit, in consideration of the marriage, under a previous oral agreement, held fraudulent as to creditors in suit by trustee in bankruptcy. Hosmer v. Tiffany, 54 Misc. Rep. (N. Y.) 402, 105 N. Y. Supp. 1055, 17 Am. B. R. 318.

Ala.—Carter v. Worthington, 82 Ala. 334, 2 So. 516, 60 Am. Rep. 738.

Ill.—Keady v. White, 168 Ill. 76, 48 N. E. 314, *aff'g* 69 Ill. App. 405.

Md.—Albert v. Wynn, 5 Md. 66. Md. 66.

Mass.—Deshon v. Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518.

N. C.—Credle v. Carrawan, 64 N. C. 422.

Pa.—Barnes v. Black, 193 Pa. St. 447, 44 Atl. 550, 74 Am. St. Rep. 694; Flory v. Houck, 186 Pa. St. 263, 40 Atl. 482, it cannot be sustained by relation back to an oral ante-nuptial agreement.

Eng.—In re Holland (1902), 2 Ch. 360, 71 L. J. Ch. 518, 86 L. T. Rep. N. S. 542, 9 Manson, 259, 50 Wkly. Rep. 575; Warden v. Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J.

Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint, 916; Trowell v. Shenton, L. R. 8 Ch. Div. 318; L'Estrange v. Robinson, 1 Hog. 202; Randall v. Morgan, 12 Ves. Jr. 67, 8 Rev. Rep. 289, 33 Eng. Reprint, 26.

Compare Mechanics' Bank v. Taylor, 16 Fed. Cas. No. 9,386, 2 Cranch C. C. 507, where the husband purchased real estate in his wife's name with money which belonged to the wife before the marriage; Wood v. Savage, Walk. (Mich.) 471.

53. *N. Y.*—Wickes v. Clarke, 3 Edw. Ch. 58, 8 Paige, 161, where the settlement was sustained as to personalty but declared void as to real property.

U. S.—Cathcart v. Robinson, 30 U. S. 264, 8 L. Ed. 120; Wiswell v. Jarvis, 9 Fed. 84.

Ala.—Costillo v. Thompson, 9 Ala. 937.

Ga.—Denbell v. Fisher, R. M. Charl. 36.

Ill.—Philips v. Meyers, 82 Ill. 67, 25 Am. Rep. 295; Sweeney v. Dameron, 47 Ill. 450.

Mo.—Potter v. McDowell, 31 Mo. 62.

N. J.—Manning v. Riley, 52 N. J. Eq. 39, 27 Atl. 810; Belford v. Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155; Doughty v. King, 10 N. J. Eq. 396.

N. C.—Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482; Walton v. Parrish, 95 N. C. 259; Kissam v. Edmonston, 36 N. C. 180.

debtor for his wife and children may be valid as to subsequent creditors,⁵⁴ or purchasers,⁵⁵ of the grantor. A post-nuptial contract or settlement made for an honest purpose and a valuable consideration,⁵⁶ or a reasonable settlement upon the wife, made by the husband out of property coming to her by descent or devise during coverture,⁵⁷ is valid and will be supported, even against existing creditors of the husband. But if the settlement be in consideration of an indebtedness much less than the value of the property, or conveys property for an insufficient consideration, it

Ohio.—Bank of U. S. v. Ennis, Wright, 604; Woodrow v. Sargent, 5 Ohio Dec. 209, 3 Am. L. Rec. 522; Case v. Hewitt, 10 Ohio S. & C. Pl. Dec. 365, 7 Ohio N. P. 609.

S. C.—Davidson v. Graves, Riley Eq. 246; Teasdale v. Reaborne, 2 Bay, 546.

Tenn.—Perkins v. Perkins, 1 Tenn. Ch. 537.

Tex.—Reynolds v. Lansford, 16 Tex. 286.

Va.—Flynn v. Jackson, 93 Va. 341, 25 S. E. 1; De Farges v. Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659; Perry v. Ruby, 81 Va. 317; Fink v. Denny, 75 Va. 663; Russell v. Randolph, 26 Gratt. 705; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 518.

Eng.—Middlecome v. Marlow, 2 Atl. 519, 26 Eng. Reprint, 712; Stephens v. Olive, 2 Bro. Ch. 90, 29 Eng. Reprint, 52; Kidney v. Coussmaker, 12 Ves. Jr. 136, 2 Rev. Rep. 118, 33 Eng. Reprint, 53; Lush v. Wilkinson, 5 Ves. Jr. 384, 31 Eng. Reprint, 642. Compare Offutt v. King, 1 McArthur (D. C.), 312; Hume v. Condon, 44 W. Va. 553, 30 S. E. 56.

54. N. Y.—Seaman v. Wall, 54 How. Prac. 47.

U. S.—United States v. Griswold, 8

Fed. 556, 7 Sawy. 311; Sexton v. Wheaton, 21 U. S. 229, 5 L. Ed. 603.

Md.—Atkinson v. Phillips, 1 Md. Ch. 507.

Miss.—Bullit v. Taylor, 34 Miss. 708, 69 Am. Dec. 412; Vertner v. Humphreys, 22 Miss. 130.

Ohio.—Bank of U. S. v. Ennis, Wright, 604.

Pa.—Thompson v. Allen, 103 Pa. St. 44, 49 Am. Rep. 116.

55. Bank of Alexandria v. Patton, 1 Rob. (Va.), 499.

56. Butler v. Rickets, 11 Iowa, 107, money advanced by a woman, before marriage and subsequent thereto, from her own estate; Hargroves v. Meray, 2 Hill Eq. (S. C.) 222, a settlement by a husband on his wife on a separation, where there is a covenant to save him harmless from his wife's debts; Walden v. Walden, 33 Gratt. (Va.), 88.

57. Wickes v. Clarke, 3 Edw. Ch. 58, 8 Paige, 161; Trustees of Wadsworthville Poor School v. Pryson, 34 S. C. 401, 13 S. E. 619; Bank of U. S. v. Brown, 2 Hill Eq. (S. C.), 558, 30 Am. Dec. 380, Riley Eq. (S. C.), 131; Napier v. Wightman, Spear Eq. (S. C.), 157; In re Tetley, 66 L. J. Q. B. 111, 75 L. T. Rep. N. S. 166, 3 Manson, 226.

will be held void as against existing creditors.⁵⁸ A wife's release of dower is a sufficient consideration for a settlement on her from her husband's property, and such settlement will be valid as against creditors having no specific lien, unless it manifestly appears to be grossly excessive.⁵⁹

§ 29. **Adequacy of consideration.**—A valuable consideration does not necessarily mean full value; the statute is complied with if the sum is a substantial amount when compared with the value of the property transferred. If it is, although inadequate, it will be held sufficient to sustain the grantee's title, unless he is chargeable with notice of the fraudulent intent of the grantor.⁶⁰ If a sale is made for a valuable, though inadequate consideration, in good faith, it will not be defeated either by the common law or the statute of frauds.⁶¹ A conveyance expressing as a consideration a sum of money or any other thing, no matter how small in value, cannot be said as a matter of law to be a voluntary conveyance.⁶² The adequacy of a valuable consideration will be inquired into

58. *Hord's Adm'rs v. Rust*, 7 Ky. 231; *Peigne v. Snowden*, 1 Desauss. Eq. (S. C.) 591; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883.

59. *Hoot v. Sorrell*, 11 Ala. 386, *Hershy v. Latham*, 46 Ark. 542; *Ficklin's Adm'r v. Rixey*, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *Burwell's Ex'r V. Lumsden*, 24 Gratt. (Va.), 443, 18 Am. Rep. 648; *Lewis v. Caperton*, 8 Gratt. (Va.), 148; *Harrison v. Carroll*, 11 Leigh (Va.), 476; *Glascoek v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

60. *Truesdale v. Sarles*, 104 N. Y. 164, 10 N. E. 139; *Greenough v. Greenough*, 21 Misc. Rep. (N. Y.), 727, 47 N. Y. Supp. 1096; *King v. Simmons*, 55 N. Y. Supp. 173; *McCaskle v. Amarine*, 12 Ala. 17; *Day*

v. Cole, 44 Iowa, 452; *Purcell, etc., Grocery Co. v. Bryant* (Ind. Ter. 1905), 89 S. W. 662; *Mullins v. Hand*, 17 Ky. L. Rep. 612, 31 S. W. 726, where the amount paid was equal to the value of the land less the incumbrance thereon assumed by the grantee, the consideration was sufficient.

The fact that the title is in doubt is to be considered upon the question of the adequacy of the consideration for the conveyance. *Banta v. Terry*, 2 Ky. L. Rep. 202.

A consideration which is inadequate is not "valuable," within the meaning of the Kentucky statute. *Carter v. Richardson*, 22 Ky. L. Rep. 1204, 60 S. W. 397.

61. *Andrews v. Jones*, 10 Ala. 400.

62. *Martin v. White*, 115 Ga. 866, 42 S. E. 279.

only for the purpose of throwing light upon the transaction.⁶³ Where a conveyance is made by a grantor, who is indebted at the time, upon a valuable consideration that is inadequate, such inadequacy does not render the conveyance voluntary,⁶⁴ but it is evidence, though not conclusive, of actual fraud.⁶⁵ When there is no actual intent to defraud, a valuable consideration though inadequate, will sustain the transfer in a court of law.⁶⁶ But where there is no actual fraud on the part of the grantee, although the grantee is not affected by the fraudulent intent of his grantor not known to him, yet, if the consideration be inadequate, a court of equity will treat the conveyance merely as a security for the consideration actually paid, and as fraudulent and void, and subject to the claims of prior creditors, as to the excess in value of the property conveyed over the actual consideration.⁶⁷ Where a con-

63. *Jones v. Dunbar*, 52 Neb. 151, 71 N. W. 976.

64. *Wright v. Stanard*, 30 Fed. Cas. No. 18,094, 2 Brock, 311; *Brown v. Case*, 41 Oreg. 221, 69 Pac. 43.

65. *Wright v. Stanard*, *supra*; *Washband v. Washband*, 27 Conn. 424.

66. *Jones v. Leeds*, 10 Ohio S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

67. *N. Y.*—*Van Wyck v. Baker*, 16 Hun, 168; *Bigelow v. Ayrault*, 46 Barb. 143; *Boyd v. Dunlap*, 1 John Ch. 478. See also *Robinson v. Stewart*, 10 N. Y. 189, a grantee for an inadequate consideration, who has paid debts of his grantor in part consideration, is to be substituted in the place of the creditors whose debts he has paid.

U. S.—*Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786.

Ala.—*Gilkey v. Pollock*, 82 Ala. 503, 3 So. 99.

Fla.—*Loring v. Dunning*, 16 Fla. 119; *Barrow v. Bailey*, 5 Fla. 9.

Ill.—*McManus v. Mills*, 19 Ill. App. 398; *McQuown v. Law*, 18 Ill. App. 34.

Ind.—*Smith v. Selz*, 114 Ind. 229, 16 N. E. 524.

Iowa.—*Wiltse v. Flack*, 115 Iowa, 51, 87 N. W. 729; *Cox v. Collis*, 109 Iowa, 270, 80 N. W. 343; *Hansen v. Gregory* (1897), 73 N. W. 478; *Lyon v. Haddock*, 59 Iowa, 682, 13 N. W. 737; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Keeder v. Murphy*, 43 Iowa, 413.

Ky.—*Farmers' Bank v. Long*, 7 Bush. 337; *Short v. Tinsley*, 1 Metc. 397, 71 Am. Dec. 482.

Md.—*Hull v. William Deering Co.*, 80 Md. 424, 13 Atl. 416; *Cone v. Cross*, 72 Md. 102, 19 Atl. 391; *Hinkle v. Wilson*, 53 Md. 287; *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

Mass.—*Norton v. Norton*, 5 Cush. 524.

Miss.—*Willis v. Gathman*, 53 Miss. 721.

Neb.—*Omaha Brewing Assoc. v. Zeller*, 4 Neb. (Unoff.) 198, 93 N. W. 762.

N. J.—*Gnichtel v. Jewell* (Ch. 1898), 41 Atl. 227, *aff'd* 59 N. J. Eq. 651, 44 Atl. 1099; *Withrow v. War-*

veyance is made with fraudulent intent on the part of both parties to the transaction, or the fraudulent intent of the grantor is participated in by the grantee, it is absolutely fraudulent as against creditors and cannot stand as security or indemnity for part of the consideration expressed which was, in fact, paid, or as a security for any purpose of indemnity or reimbursement.⁶⁸

§ 30. **Partial invalidity or illegality of consideration.**—Where a part of the consideration for a conveyance or transfer is fictitious, invalid, illegal, or fraudulent as to creditors, though the consideration may be in part valid, the conveyance or transfer is void *in toto*, and will not be sustained to the extent of the adequate and honest debt or consideration, as against creditors of the grantor.⁶⁹ Where, however, there was no actual intent to defraud,⁷⁰

ner, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 505; Muirhead v. Smith, 35 N. J. Eq. 303.

N. C.—McCanless v. Reynolds, 74 N. C. 301.

S. C.—McMeekin v. Edmunds, 1 Hill Eq. 288, 26 Am. Dec. 203.

Vt.—Foster v. Foster, 56 Vt. 540; Church v. Chapin, 35 Vt. 223.

Va.—Rixey's Adm'r v. Deitrick, 85 Va. 42, 6 S. E. 615.

Wis.—First Nat. Bank v. Bertschy, 52 Wis. 438, 9 N. W. 534.

68. Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928, *aff'g* 54 Hun, 473, 7 N. Y. Supp. 717; Billings v. Russell, 101 N. Y. 226; Dewey v. Moyer, 72 N. Y. 70; Sands v. Codwise, 4 Johns. (N. Y.) 336, 4 Am. Dec. 305; Boyd v. Dunlap, 1 Johns. Ch. (N. Y.) 478; Loring v. Dunning, 16 Fla. 119; Farmers' Bank v. Long, 7 Bush. (Ky.) 337. See also Effect of consideration, chap. XIII, § 30, *infra*; Partially invalid or illegal consideration, chap. VIII, § 30, *infra*; Reimbursement, indemnity and subroga-

tion in case of actual fraud, chap. XIV, § 41, *infra*.

69. N. Y.—Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928, *aff'g* 54 Hun, 473, 7 N. Y. Supp. 717; Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. Supp. 159; Shaffer v. Martin, 25 App. Div. 501, 49 N. Y. Supp. 853; Johnson v. Phillips, 2 N. Y. Supp. 432.

Ala.—Harris v. Russell, 93 Ala. 59, 9 So. 541; Tatum v. Hunter, 14 Ala. 557.

Conn.—Hawes v. Mooney, 39 Conn. 37.

Ill.—Oakfield v. Dunlap, 63 Ill. App. 498.

Ind.—Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701, unless the contract is such that the legal part thereof may be separated from the illegal.

Mo.—Klauber v. Schloss, 198 Mo. 502, 95 S. W. 930; First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; Mansur, etc., Implement Co. v. Jones, 143 Mo. 253, 45 S. W. 41; Boland v. Ross, 120 Mo. 208, 25 S. W. 520;

nor any actual fraud,⁷¹ and the consideration is not one and indivisible,⁷² but is such that the legal part is separable from the illegal,⁷³ a court of equity will separate the bad part from the good and sustain the conveyance as to the good consideration.⁷⁴ It has been held that the general rule that the illegality of a part of a separable consideration taints the whole, cannot be made a test of the validity of a conveyance, as against creditors.⁷⁵ A transfer of property by an insolvent debtor to two or more of his creditors, in payment of a distinct indebtedness owing to each, gives each of them an undivided interest in the property or an interest in proportion to the debts secured, and may be sustained as to one of

National Tube Works Co. v. Ring Refrigerating, etc., Co., 118 Mo. 365, 22 S. W. 947; *State v. Hope*, 102 Mo. 410, 14 S. W. 985; *Hayden v. Alkire Grocery Co.*, 88 Mo. App. 241; *Webb City Lumber Co. v. Victor Min. Co.*, 78 Mo. App. 676; *Ball v. O'Neill*, 64 Mo. App. 388; *Cole v. Yancy*, 62 Mo. App. 234; *H. T. Simon Gregory Dry Goods Co. v. McMahan*, 61 Mo. App. 499; *Gregory v. Sitlington*, 54 Mo. App. 60; *Cordes v. Straszer*, 8 Mo. App. 61.

Vt.—*Dow v. Taylor*, 71 Vt. 337, 45 Atl. 220, 76 Am. St. Rep. 775.

Wis.—*Blanik v. Barta* (Wis. 1906), 109 N. W. 980.

Can.—*Campbell v. Patterson*, 21 Can. Sup. Ct. 645; *Totten v. Douglass*, 15 Grant Ch. (U. C.) 126; *Commercial Bank v. Wilson*, 14 Grant Ch. (U. C.) 473, 3 Grant Err. & App. (U. C.) 257.

70. *Coley v. Coley*, 14 N. J. Eq. 350; *Rosenbaum v. Davis* (Tenn. Ch. App. 1898), 48 S. W. 706; *First Nat. Bank v. Bertschy*, 52 Wis. 438, 9 N. W. 534.

71. *Matz v. Arick*, 76 Conn. 388, 56 Atl. 630.

72. *Hawes v. Mooney*, 39 Conn. 37.

73. *Reagan v. First Nat. Bank*, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701.

74. *N. Y.*—*McArthur v. Hoysradt*, 11 Paige, 495, a vendee of the debtor may be compelled to account to the creditor for amounts, improperly as against creditors, deducted from the contract.

Ala.—*Gilkey v. Pollock*, 82 Ala. 503, 3 So. 99.

Ill.—*Deunehy v. Smith*, 83 Ill. App. 656.

Ind.—*Reed v. Thayer*, 9 Ind. 157.

Iowa.—*Morrell v. Sharp* (1898), 74 N. W. 749.

Ky.—*Seiler v. Walz*, 100 Ky. 105, 29 S. W. 338, 31 S. W. 729, 17 Ky. L. Rep. 301; *Williamson v. Blackburn*, 26 Ky. L. Rep. 857, 82 S. W. 600.

La.—*Brown v. Kenner*, 3 Mart. (La.) 370.

Mo.—*Columbia Sav. Bank v. Winn*, 132 Mo. 80, 33 S. W. 457.

N. J.—*Smith v. O'Brien*, 57 N. J. L. 365, 41 Atl. 492.

Eng.—*Stokoe v. Cowan*, 29 Beav. 637, 7 Jur. N. S. 901, 4 L. T. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint, 775.

75. *Albee v. Webster*, 16 N. H. 362.

them which is *bona fide*, although the transfer as to the others is invalid as in fraud of creditors, because the debts are fictitious and fraudulent.⁷⁶ A conveyance may be void in part, not only at common law, but by statute also, and stand good as to the residue.⁷⁷ But transfers and mortgages made, or judgments confessed, to one creditor in payment or security for his indebtedness, made partly for valid debts, but including false and fraudulent debts or fictitious liabilities, are fraudulent and void, not to the extent of the fraud, but absolutely and as an entirety.⁷⁸

76. *N. Y.*—Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834; Commercial Bank v. Bolton, 20 App. Div. 70, 46 N. Y. Supp. 734.

Ala.—Anderson v. Hooks, 9 Ala. 704.

Ark.—Riggan v. Wolfe, 53 Ark. 537, 14 S. W. 922.

Ill.—Hutmacher v. Anheuser-Busch Brewing Assoc., 71 Ill. App. 154.

Iowa.—Miller Co. v. Bracken, 104 Iowa, 643, 74 N. W. 2.

Mass.—Prince v. Shepard, 9 Pick. 176.

Minn.—Henderson v. Kendrick, 72 Minn. 253, 75 N. W. 127.

Mo.—Woodson v. Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197.

N. C.—Blair v. Brown, 116 N. C. 631, 21 S. E. 434; Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482; Morris v. Pearson, 79 N. C. 253, 28 Am. Rep. 315, *distinguishing* Hafner v. Irvin, 23 N. C. 490, and *overruling* Stone v. Marshall, 52 N. C. 300, and Johnson v. Murchison, 60 N. C. 286.

Tex.—Pittman v. Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108; Linz v. Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542; Ryder v. Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314, *overruling* Simon v. Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

Va.—Lewis v. Caperton's Ex'r, 8 Gratt. 148.

W. Va.—Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. 611; Cohn v. Ward, 36 W. Va. 516, 15 S. E. 140, 32 W. Va. 34, 9 S. E. 41.

Contra.—Showman v. Lee, 86 Mich. 556, 49 N. W. 578; Adams v. Niemann, 46 Mich. 135, 8 N. W. 719.

77. Anderson v. Hooks, 9 Ala. 704.

78. *N. Y.*—Simons v. Goldbach, 56 Hun, 204, 9 N. Y. Supp. 359; Johnson v. Phillips, 2 N. Y. Supp. 432.

Ala.—Proskauer v. Peoples' Sav. Bank, 77 Ala. 257.

Kan.—Miami County Nat. Bank v. Barkalow, 53 Kan. 68, 35 Pac. 796, inclusion in a mortgage from a failing firm of a debt due from one not a member of the firm; Marborough v. Lewis Cook Mfg. Co., 32 Kan. 636, 5 Pac. 181; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Wallach v. Wylie, 28 Kan. 138.

Mich.—Clark v. Lee, 78 Mich. 221, 44 N. W. 260; King v. Hubbell, 42 Mich. 595, 4 N. W. 440.

Mo.—Bates County Bank v. Gailey, 177 Mo. 181, 75 S. W. 646; First Nat. Bank v. Fry, 168 Mo. 492, 68 S. W. 348; Boland v. Ross, 120 Mo. 208, 25 S. W. 524; Seger v. Thomas, 107 Mo. 635, 18 S. W. 33; State v. Hope, 102 Mo. 410, 14 S. W. 985.

§ 31. **Consideration usurious in part.**—A failing debtor may pay, or secure to be paid, a debt barred by the statute of limitations, or one which he may defend as usurious; or if he has agreed to pay interest upon unpaid interest, he may pay or secure its payment; and, if done in good faith, the payments made or security taken cannot be set aside by his creditors.⁷⁹ And the fact that part of the consideration for a conveyance is compound interest does not render it void as to creditors, where no agreement for compound interest was made in advance.⁸⁰ The mere fact that a debtor has paid, or agreed to pay, more than the legal rate of interest does not constitute a fraud on the debtor's other creditors, and the mere refusal of the debtor to contest the claim does not of itself amount to such fraud.⁸¹ It is only where a usurious contract is entered into collusively, as a scheme to hinder and delay creditors, that the latter may have any standing to contest a judgment entered upon such usurious contract.⁸² Only subsequent creditors can contest a prior obligation of their debtor on the ground that it is usurious;⁸³ and they cannot do so unless in the inception of the contract it was intended to defraud them by swelling the amount of the debt, or would necessarily have that effect.⁸⁴ A confession of judgment is not void because it includes usury;⁸⁵ and a mistake in the computation of interest is no evidence that the confession of judgment was made to defraud creditors.⁸⁶ The

Okla.—*Jaffray v. Wolfe*, 4 Okla. 303, 47 Pac. 490.

Tex.—*Blair v. Finlay*, 75 Tex. 210, 12 S. W. 983; *Brasher v. Jamison*, 75 Tex. 139, 12 S. W. 809.

79. *Mellen v. Banning*, 72 Hun (N. Y.), 176, 25 N. Y. Supp. 542; *Mills v. Carnley*, 1 Bosw. (N. Y.) 159. See also *Pennington v. Woodall*, 17 Ala. 685; *Spencer v. Ayrault*, 10 N. Y. 202.

80. *Stewart v. Petree*, 55 N. Y. 621; *McConnell v. Barber*, 86 Hun (N. Y.), 360.

81. Appeal of *Lenning*, 93 Pa. St. 301; *Wheelock v. Wood*, 93 Pa. St.

298; Appeal of *Second Nat. Bank*, 85 Pa. St. 528; *Cahn v. Farmers' & Traders' Bank*, 1 S. D. 237, 46 N. W. 185; *Spaulding v. Austin*, 2 Vt. 555.

82. Appeal of *Lenning*, *supra*; *Wheelock v. Wood*, *supra*.

83. *Lombaert v. Morris*, 2 Del. Co. R. (Pa.) 457; *Building Assoc. v. O'Connor*, 3 Phila. (Pa.) 453, 16 Leg. Int. 300.

84. *Loucheim v. First Nat. Bank*, 98 Ala. 521, 13 So. 374; *Harris v. Russell*, 93 Ala. 59, 9 So. 541; *Lombaert v. Morris*, *supra*.

85. *Miller v. Clarke*, 37 Iowa, 325.

86. *Scales v. Scott*, 13 Cal. 76.

fact that usurious interest is included in a judgment taken by default is of itself no evidence of an intent to defraud creditors.⁸⁷ But a judgment recovered by default in an action commenced at the suggestion of the debtor is fraudulent so far as it includes compound interest, for which there was no valid agreement.⁸⁸ A pretended sale of property to secure usurious advances and protect it against the vendor's creditors is fraudulent, and may be attacked by any of them.⁸⁹

§ 32. **Voluntary conveyances — Effect of want of consideration.**—A voluntary conveyance is one without any valuable consideration and implies the total want of any substantial consideration.⁹⁰ A conveyance or transfer of property made voluntarily and without a valuable consideration by a debtor, while insolvent or in contemplation of insolvency, with the actual intent to defraud either existing or subsequent creditors, is void as to the creditors intended to be defrauded.⁹¹ The fact that the grantor

87. *Cahn v. Farmers' & Traders' Bank*, 1 S. D. 237, 46 N. W. 185.

88. *Peyser v. Myers*, 56 Hun (N. Y.), 175, 9 N. Y. Supp. 229, *rev'g* 5 N. Y. Supp. 827.

89. *Gravier's Curator v. Carraby's Ex'r*, 17 La. 118, 36 Am. Dec. 608. See also *Chandler v. Powers*, 9 St. Rep. (N. Y.) 169.

90. *Seward v. Jackson*, 8 Cow. (N. Y.) 430; *Washband v. Washband*, 27 Conn. 431.

91. *Cal.*—*Nixon v. Goodwin* (Cal. App. 1906), 85 Pac. 169.

Fla.—*Ullman v. Lockhart* (Fla. 1906), 41 So. 452, when the grantee is a party to the fraudulent intent, it is immaterial whether the grantor was solvent or insolvent at the time of the execution of the conveyance.

Ga.—*Ernest v. Merritt*, 107 Ga. 61, 32 S. E. 898; *May v. Huntington*, 66 Ga. 208; *Westmoreland v. Powell*, 59 Ga. 256.

Ind.—*Johnson v. Jones*, 79 Ind. 141.

Mo.—*Klauber v. Schloss*, 198 Mo. 502, 95 S. W. 930.

N. J.—*Le Herisse v. Hess* (Ch. 1904), 57 Atl. 808; *Mead v. Combs*, 19 N. J. Eq. 112.

Or.—*Marks v. Crow*, 14 Or. 382, 13 Pac. 55.

Tenn.—*Churchill v. Wells*, 7 Coldw. 364.

Vt.—*Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976.

W. Va.—*Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

A voluntary conveyance by an insolvent, though without intent to defraud, is fraudulent. *James v. Mallory* (Ark. 1905), 89 S. W. 472.

When a person, as a mere donee, is put in possession of land, without any promise of a conveyance, and rents it, collecting the rents for

retained property sufficient to satisfy his creditors is no defense to an attack made upon the conveyance by creditors whom he intended to defraud; it is only where a voluntary conveyance is made in good faith, that it will be upheld by proof that the grantor retained an ample estate to pay his debts.⁹² If the conveyance were made with intent to hinder or delay creditors, it should be set aside, without regard to the financial condition of the fraudulent transferrer. A rich man may make a fraudulent deed as well as one who is insolvent.⁹³ A wife is within the protection of the statute against fraudulent conveyances, and a voluntary conveyance of property, made with the specific intent to defraud a future wife of her marital rights, is void to the same extent as if it was intended to defraud future creditors, although the grantor has not at the time of the conveyance selected any particular person as his wife, but makes the conveyance with the general intention to defraud any person whom he might marry of her marital rights.⁹⁴

§ 33. **Voluntary conveyances as to existing creditors.**—The doctrine was maintained by the early English cases,⁹⁵ by the lead-

his own use, but expends neither labor nor money thereon, nor puts any improvements on it, he cannot hold the same as against the creditors of the insolvent donor. *Ansell v. Cox* (W. Va. 1905), 50 S. E. 806.

92. *N. Y.*—*Fox v. Moyer*, 54 N. Y. 125; *Harding v. Elliott*, 92 Hun, 502, 36 N. Y. Supp. 648.

Cal.—*First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64.

Ill.—*Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599.

Miss.—*Edmunds v. Mister*, 58 Miss. 765.

Neb.—*Shreck v. Hanlon*, 66 Neb. 451, 92 N. W. 625; *McIntyre v. Malone*, 3 Neb. (Unoff.) 159, 91 N. W. 246.

Vt.—*Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429.

Compare Flannagan v. Donaldson, 85 Ind. 517.

93. *Hager v. Shindler*, 29 Cal. 47.

94. *Higgins v. Higgins*, 219 Ill. 146, 76 N. E. 86.

95. *White v. Sansom*, 3 Atk. 410, 26 Eng. Reprint, 1037; *Fitzer v. Fitzer*, 2 Atk. 511, 26 Eng. Reprint, 708; *Stileman v. Ashdown*, 2 Atk. 481, 26 Eng. Reprint, 688, Ambl. 13, 27 Eng. Reprint, 7; *Russell v. Hammond*, 1 Atk. 13, 26 Eng. Reprint, 9; *Shears v. Rogers*, 3 B. & Ad. 362, 1 L. J. K. B. 89, 23 E. C. L. 164; *Doe v. Martyr*, 1 B. & P. N. R. 332, 2 Rev. Rep. 821; *Gardiner v. Painter*, Cas. t. King, 65, 25 Eng. Reprint, 225; *Doe v. Manning*, 9 East, 59, 9 Rev. Rep. 503; *Tonkin v. Ennis*, 1 Eq. Cas. Abr. 334, 21 Eng. Reprint, 1084; *Hill v. Exeter*, 2 Taunt. 69, 11 Rev. Rep. 527; *Nunn v. Wilsmore*, 8 T.

ing American case,⁹⁶ and has been followed by authorities in some of the states,⁹⁷ that a voluntary conveyance is, as to existing cred-

R. 521, 5 Rev. Rep. 434; *Ex parte Berry*, 19 Ves. Jr. 218, 34 Eng. Reprint, 499; *Buckle v. Mitchell*, 18 Ves. Jr. 100, 11 Rev. Rep. 155, 34 Eng. Reprint, 255; *Townshend v. Windham*, 2 Ves. 1, 28 Eng. Reprint, 1; *Beaumont v. Thorpe*, 1 Ves. 27, 27 Eng. Reprint, 869; *Harman v. Richards*, 10 Hare, 81, 22 L. J. Ch. 1066, 44 Eng. Ch. 78.

96. *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520. This decision of Chancellor Kent has been declared to be "the greatest monument of legal acumen and wide and varied erudition which New York has ever produced," and it was also asserted that "unless indications are wholly delusive the learned Chancellor was not more than a century in advance of his age." Fraudulent Conveyances to *Bona Fide* Purchasers, etc., by John Reynolds, Esq. This case was subsequently overruled by *Seward v. Jackson*, 8 Cow. (N. Y.) 406, and the contrary rule is now established by statute. *Holden v. Burnham*, 63 N. Y. 74; *Dygert v. Remerschnider*, 32 N. Y. 636.

97. *U. S.*—*Hopkirk v. Randolph*, 12 Fed. Cas. No. 6,698, 2 Brock. 132.

Ala.—*Wood v. Potts*, 140 Ala. 425, 37 So. 253; *Guyton v. Terrell*, 132 Ala. 66, 31 So. 83; *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; *McClarlin v. Anderson*, 109 Ala. 571, 19 So. 982; *Wooten v. Steele*, 109 Ala. 563, 19 So. 972, 55 Am. St. Rep. 947; *Ruse v. Bromberg*, 88 Ala. 619, 7 So. 384; *Lockard v. Nash*, 64 Ala. 385; *Bibb v. Freeman*, 59 Ala. 612; *Spencer v. Godwin*, 30 Ala. 355; *Gannard*

v. Enslava, 20 Ala. 732; *Foot v. Cobb*, 18 Ala. 585; *High v. Nelms*, 14 Ala. 350, 48 Am. Dec. 103; *Moore v. Spencer*, 6 Ala. 506; *Doe v. McKinney*, 5 Ala. 719; *Miller v. Thompson*, 3 Port. 196.

N. J.—*Kinsey v. Feller*, 64 N. J. Eq. 367, 51 Atl. 485; *Hancock v. Elmer*, 61 N. J. Eq. 558, 49 Atl. 140, *aff'd* 63 N. J. Eq. 802, 52 Atl. 1131; *Long Branch Banking Co. v. Dennis*, 56 N. J. Eq. 549, 39 Atl. 689; *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, 51 Am. St. Rep. 641; *Merchants', etc., Transp. Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272; *Francis v. Lawrence*, 48 N. J. Eq. 508, 22 Atl. 259; *Gardner v. Kleinke*, 46 N. J. Eq. 90, 18 Atl. 457; *Palmer v. Martindell*, 43 N. J. Eq. 90, 10 Atl. 802; *Aber v. Brant*, 36 N. J. Eq. 116; *Budd v. Atkinson*, 30 N. J. Eq. 530; *Randall v. Vroom*, 30 N. J. Eq. 353; *Kuhl v. Martin*, 26 N. J. Eq. 60; *Hecht v. Koegal*, 25 N. J. Eq. 135; *Phelps v. Morrison*, 24 N. J. Eq. 195; *Annin v. Annin*, 24 N. J. Eq. 184; *Sayre v. Fredericks*, 16 N. J. Eq. 205; *Smith v. Vreeland*, 16 N. J. Eq. 198; *Coley v. Coley*, 14 N. J. Eq. 350; *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381.

S. C.—*Woody v. Dean*, 24 S. C. 499; *Hudnall v. Teasdale*, 1 McCord, 227, 10 Am. Dec. 671.

The only qualification to the general rule is, that when the indebtedness is slight, as for the current expenses of the family, or the debts inconsiderable as compared with the value of the donor's estate, and the creditor, by his delay or laches has allowed the reserved es-

itors of the grantor, *per se* fraudulent and void, without regard to the solvency of the grantor, the intention of the parties, or the value of the property conveyed. But the rule is now established by the weight of authority, both English and American, that a voluntary conveyance is not necessarily, from the mere want of consideration, fraudulent as to existing creditors, but raises only a presumption of fraud in fact, which, however, is not conclusive, and may be rebutted. The question of fraudulent intent in a conveyance is one of fact, and not of law, and the conveyance is not to be adjudged fraudulent as against creditors solely on the ground that it was not founded on a valuable consideration, but the party seeking to set aside the conveyance must establish, as a ground for the inference of fraud, some fact besides the voluntary character of the conveyance. The amount of the grantor's indebtedness, the total value of his property, and the value of the part conveyed are to be considered in determining whether a conveyance is valid or fraudulent, and if it appears that the grantor retained property amply sufficient to pay all his debts, the conveyance is not invalid, although voluntary.⁹⁸ The validity of a

tate to be wasted, in such case the conveyance will be held valid. *Richardson v. Rhodus*, 14 Rich. L. 95; *Hudnal v. Wilder*, 14 McCord, 294, 17 Am. Dec. 744. See also *Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15; *Blakeney v. Kirkley*, 2 Nott & M. 544.

Can.—*Irwin v. Freeman*, 13 Grant Ch. (U. C.) 465.

98. *N. Y.*—*Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Genesee River Nat. Bank v. Mead*, 92 N. Y. 637; *Cole v. Tyler*, 65 N. Y. 78; *Dunlap v. Hawkins*, 59 N. Y. 346; *Erickson v. Quinn*, 47 N. Y. 410; *Dygert v. Remerschnider*, 32 N. Y. 629; *Van Wyke v. Seward*, 6 Paige, 62.

U. S.—*Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454; *Polk County Nat. Bank v. Scott*, 132

Fed. 897, 66 C. C. A. 51; *Wiswell v. Jarvis*, 9 Fed. 84; *Beecher v. Clarke*, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256, *aff'd* 154 U. S. 631, 14 Sup. Ct. 1184, 24 L. Ed. 705; *Hopkirk v. Randolph*, 12 Fed. Cas. No. 6,698, 2 Brock. 132; *Magniac v. Thompson*, 16 Fed. Cas. No. 8,956, *Baldw.* 344, *aff'd* 7 Pet. 348, 8 L. Ed. 709.

Ark.—*De Prato v. Jester* (1892), 20 S. W. 807; *Chambers v. Sallie*, 29 Ark. 407; *Bertrand v. Elder*, 23 Ark. 494; *Smith v. Yell*, 8 Ark. 470; *Dood v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301.

Colo.—*Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850.

Conn.—*Fishel v. Motta*, 76 Conn. 197, 56 Atl. 558.

D. C.—*Edwards v. Entwistle*, 2 Mackey, 43; *Offutt v. King*, 1 MacArthur, 312.

voluntary transfer is determined largely by the fact as to whether the debtor at the time of the conveyance has sufficient estate left

Fla.—*Clafin v. Ambrose*, 37 Fla. 78, 19 So. 628.

Ga.—*Lytle v. Black*, 107 Ga. 386, 33 S. E. 414; *Ernest v. Merritt*, 107 Ga. 61, 32 S. E. 898; *Brown v. Spivey*, 53 Ga. 155; *Weed v. Davis*, 25 Ga. 684.

Ill.—*Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341; *Higgins v. White*, 118 Ill. 619, 8 N. E. 808; *Bittenger v. Kasten*, 111 Ill. 260; *Merrell v. Johnson*, 96 Ill. 224; *Mathews v. Jordan*, 88 Ill. 602; *Patrick v. Patrick*, 77 Ill. 555; *Gridley v. Watson*, 53 Ill. 186; *Moritz v. Hoffman*, 35 Ill. 553; *Smith v. A. J. Somers Mfg. Co.*, 69 Ill. App. 230; *Sammis v. Poole*, 89 Ill. App. 118, *aff'd* 188 Ill. 396, 58 N. E. 934; *Dillman v. Nadelhoffer*, 56 Ill. App. 517; *Aultman v. Hudlestun*, 31 Ill. App. 556; *Uhre v. Melum*, 17 Ill. App. 182; *Koster v. Hiller*, 4 Ill. App. 21.

Iowa.—*Crary v. Kurtz* (1905), 105 N. W. 590; *Eighmy v. Brock*, 126 Iowa, 535, 102 N. W. 444; *Cloud v. Malvin*, 108 Iowa, 52, 75 N. W. 645, 78 N. W. 791, 45 L. R. A. 209; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. 143; *Gwyer v. Figgins*, 37 Iowa, 517; *Stewart v. Rogers*, 25 Iowa, 395, 95 Am. Dec. 794; *Gardiner v. Baker*, 25 Iowa, 343; *Carson v. Foley*, 1 Iowa, 524.

Kan.—*Chantland v. Midland Nat. Bank*, 66 Kan. 549, 72 Pac. 230; *Tootle v. Caldwell*, 30 Kan. 125, 1 Pac. 329.

Me.—*Spear v. Spear*, 97 Me. 454, 98 Atl. 1106; *Stevens v. Robinson*, 72 Me. 381; *French v. Holmes*, 67 Me. 186; *Grant v. Ward*, 64 Me. 239; *Neil v. Tenney*, 42 Me. 322; *Borne-*

man v. Sidlinger, 15 Me. 429, 33 Am. Dec. 626.

Md.—*Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Grover, etc., Sewing Mach. Co. v. Radcliff*, 63 Md. 496; *Warner v. Dove*, 33 Md. 579; *Ellinger v. Crowl*, 17 Md. 361; *Baxter v. Sewell*, 3 Md. 334; *Worthington v. Shipley*, 5 Gill, 449; *Allein v. Sharp*, 7 Gill & J. 96; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Kipp v. Hanna*, 2 Bland, 26; *Hoye v. Penn*, 1 Bland, 28.

Mass.—*Matthews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676; *Stratton v. Edwards*, 174 Mass. 374, 54 N. E. 886; *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439, 52 N. E. 544; *Clark v. McMahon*, 170 Mass. 911, 48 N. E. 939; *Cook v. Holbrook*, 146 Mass. 66, 14 N. E. 943; *Lerow v. Wilmarth*, 91 Mass. 382; *Green v. Tanner*, 49 Mass. 441.

Mich.—*Wooden v. Wooden*, 72 Mich. 347, 40 N. W. 460.

Minn.—*Blake v. Boisjoli*, 51 Minn. 296, 53 N. W. 637; *Filley v. Register*, 4 Minn. 391, 77 Am. Dec. 522.

Miss.—*Cowen v. Alsop*, 51 Miss. 158; *Pennington v. Seal*, 49 Miss. 518; *Wilson v. Kohlheim*, 46 Miss. 346; *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191.

Mo.—*Fehlig v. Busch*, 165 Mo. 144, 65 S. W. 542; *Lander v. Ziehr*, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456; *Ridenour-Baker, etc., Grocery Co. v. Monroe*, 142 Mo. 165, 43 S. W. 633; *Hoffman v. Nolte*, 127

to satisfy the claims of his creditors.⁹⁹ Where there is reasonable doubt as to its sufficiency, the conveyance will be set aside as fraudulent as to creditors.¹ The property reserved must not only

Mo. 120, 29 S. W. 1006; Lionberger v. Baker, 88 Mo. 447; Buckner v. Stine, 48 Mo. 407; Hickey v. Ryan, 15 Mo. 63; Lane v. Kingsbury, 11 Mo. 402; Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958; American Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Boyle v. Boyle, 6 Mo. App. 594.

Neb.—Harvey v. Golding (1906), 109 N. W. 220; Light v. Kennard, 11 Neb. 129, 7 N. W. 539; Smith v. Schmitz, 10 Neb. 600, 7 N. W. 329.

N. H.—Gove v. Campbell, 62 N. H. 401; Drew v. Rust, 36 N. H. 335.

Ohio.—Crumbaugh v. Kugler, 2 Ohio St. 373; Miller v. Wilson, 15 Ohio, 108; Godell v. Taylor, Wright, 82; Johnson v. Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

Or.—Seed v. Jennings (1905), 83 Pac. 872; Robson v. Hamilton, 41 Or. 239, 69 Pac. 651; Elfelt v. Hinch, 5 Or. 255.

Pa.—Appeal of Kelly, 77 Pa. St. 232; Updegraff v. Rowland, 52 Pa. St. 317; Mullen v. Wilson, 44 Pa. St. 413, 84 Am. Dec. 461; In re Greenfield, 14 Pa. St. 489, Forsyth v. Mathews, 14 Pa. St. 100, 53 Am. Dec. 522; Mateer v. Hissim, 3 Penr. & W. 160; Thomson v. Dougherty, 12 Serg. & R. 448; Chambers v. Spencer, 5 Watts, 404; Bankard v. Shaw, 23 Pa. Co. Ct. 561.

Tenn.—Walter v. Hartman (1902), 67 S. W. 476; Conway v. Brown, 52 Tenn. 237.

Tex.—Van Bibber v. Mathis, 52 Tex. 406.

Vt.—Wilson v. Spear, 68 Vt. 145, 34 Atl. 429.

Wis.—Probert v. Sonju, 110 Wis. 181, 85 N. W. 647.

Eng.—In re Lane-Fox (1900), 2 Q. B. 508, 69 L. J. Q. B. 722, 83 L. T. Rep. N. S. 176, 7 Manson, 295, 48 Wkly. Rep. 650; Townsend v. Westcott, 2 Beav. 340, 4 Jur. 187, 9 L. J. Ch. 241, 17 Eng. Ch. 340, 48 Eng. Reprint, 1212; Cadogan v. Kennett, 2 Cowp. 432; Sedgwick v. Place, 25 L. T. Rep. N. S. 307, 5 Nat. Bankr. Reg. 168.

⁹⁹ N. Y.—Cole v. Tyler, 65 N. Y. 73; Spotten v. Keeler, 12 St. Rep. 385.

Ill.—Marmon v. Harwood, 124 Ill. 104, 16 N. E. 236, 7 Am. St. Rep. 345, the property retained must be actually and not merely apparently sufficient; Lytle v. Scott, 2 Ill. App. 646.

Me.—Jose v. Hewitt, 50 Me. 248.

Minn.—Camp v. Thompson, 25 Minn. 175.

Neb.—Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

N. H.—Marsh v. Fuller, 18 N. H. 360; Abbott v. Tenney, 18 N. H. 109.

N. C.—Houston v. Bogle, 32 N. C. 496.

The presumption of fraudulent intent arising from a voluntary conveyance is rebutted, where the debtor, subsequent to his voluntary deed, pays all his debts. Barbour v. Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154; Levering v. Norvell, 9 Baxt. (Tenn.) 176.

1. Ketcham v. Hallock, 55 Ill. App. 632; Williams v. Banks, 11 Md. 198.

be ample, but must be readily accessible to the creditors.² A voluntary conveyance by a debtor, who at the time had no other property subject to execution, may be avoided by his creditors as fraudulent.³ Where the grantor at the time of the conveyance is insolvent or practically so,⁴ or the conveyance includes all or most of the debtor's available property, leaving him without the means

2. *Ames v. Dorroh*, 76 Miss. 187, 23 So. 768, 71 Am. St. Rep. 522.

3. *Williams v. Osborne*, 95 Ind. 347; *Iles v. Cox*, 83 Ind. 577.

4. *N. Y.*—*Royer Wheel Co. v. Fielding*, 31 Hun, 274; *Warren v. Wilder*, 12 St. Rep. (N. Y.) 757.

Cal.—*Gray v. Brunold*, 140 Cal. 615, 74 Pac. 303, made so by statute; *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143; *Swartz v. Haslett*, 8 Cal. 118.

Conn.—*Trumbull v. Hewitt*, 62 Conn. 448, 26 Atl. 350.

Fla.—*McKeown v. Allen*, 37 Fla. 490, 20 So. 556.

Ga.—*Cothran v. Forsyth*, 68 Ga. 560.

Ill.—*Ramsey v. Nichols*, 73 Ill. App. 643.

Ind.—*Farmers' Bank v. First Nat. Bank*, 30 Ind. App. 520, 66 N. E. 503.

Ky.—*Lowry v. Fisher*, 65 Ky. 70, 92 Am. Dec. 475.

Me.—*Robinson v. Clark*, 76 Me. 493; *Stevens v. Robinson*, 72 Me. 381, *overruling McLean v. Weeks*, 65 Me. 611, and *Westcott v. McDonald*, 22 Me. 407; *French v. Holmes*, 67 Me. 186.

Md.—*Myers v. King*, 42 Md. 65.

Mass.—*Gray v. Chase*, 184 Mass. 444, 68 N. E. 676.

Mich.—*Beach v. White*, Walk. 495.

Minn.—*Knatvold v. Wilkinson*, 83 Minn. 265, 86 N. W. 99.

Miss.—*Catchings v. Manlove*, 39 Miss. 655.

Mo.—*Needles v. Ford*, 167 Mo. 495, 67 S. W. 240; *St. George's Church Soc. v. Branch*, 120 Mo. 226, 25 S. W. 218; *Bohannon v. Combs*, 79 Mo. 305; *White v. McPheeters*, 75 Mo. 286; *Reppy v. Reppy*, 46 Mo. 577; *Gamble v. Johnson*, 9 Mo. 605.

N. H.—*Pomeroy v. Bailey*, 43 N. H. 118.

N. C.—*Hallyburton v. Slagle*, 130 N. C. 482, 41 S. E. 877; *Burton v. Farinholt*, 86 N. C. 260; *Morgan v. McLelland*, 14 N. C. 82.

Ohio.—*Godell v. Taylor*, Wright, 82; *Humbert v. Cincinnati M. E. Church*, Wright, 213.

Pa.—*Carl v. Smith*, 8 Phila. 569.

Tex.—*Van Bibber v. Mathis*, 52 Tex. 406.

Utah.—*Gustin v. Mathews*, 25 Utah, 168, 70 Pac. 402; *Ogden State Bank v. Barker*, 12 Utah, 13, 40 Pac. 765.

Va.—*Chamberlayne v. Temple*, 2 Rand. 384, 14 Am. Dec. 786.

Eng.—*Taylor v. Coenen*, 1 Ch. Div. 636, 34 L. T. Rep. N. S. 18; *Lush v. Wilkinson*, 5 Ves. Jr. 384, 31 Eng. Reprint, 642. *Compare Mitchell v. Adams* (Tenn. Ch. App. 1898), 52 S. W. 316.

Actual insolvency is not necessary to render a voluntary conveyance void, for if a person largely indebted makes a voluntary conveyance, and shortly afterwards becomes insolvent, that is enough to set aside the conveyance as fraudulent. *Hauk*

of paying his debts,⁵ the conveyance will, as a rule, be held to be fraudulent and will be set aside at the instance of creditors. The rule by which to determine whether a voluntary conveyance is fraudulent as to creditors has also been held to be founded on the ability of the grantor to withdraw the amount of the property so conveyed from his funds, without hazarding his creditors, or in any material degree lessening their prospects of payment; and where at the time a voluntary conveyance is made, taking into consideration the value of the property transferred, and the amount of the debtor's property left with which to satisfy his indebtedness, in comparison with the amount of his indebtedness, the transfer must necessarily operate so as to hinder, delay, or defraud creditors, then the conveyance is fraudulent and avoidable.⁶

v. Van Ingen, 196 Ill. 20, 63 N. E. 705, *aff'd* 97 Ill. App. 642; Morrill v. Kilner, 113 Ill. 318; Moritz v. Hoffman, 35 Ill. 553.

Solvency or insolvency may be judged by what happens, where the grantor was embarrassed and in doubtful circumstances at the time of the conveyance. Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342; Brown v. Case, 41 Or. 221, 69 Pac. 43. See also What constitutes insolvency, chap. VII, § 8, *supra*.

The mere fact of subsequent insolvency, if it is not produced by causes existing at the time of the conveyance, will not affect it. Johnson v. Murphy, 180 Mo. 597, 79 S. W. 909; Fehlig v. Busch, 165 Mo. 144, 65 S. W. 542; Walsh v. Ketchum, 84 Mo. 427; American Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771. See also Insolvency subsequent to transfer, chap. VII, § 10, *supra*.

5. *U. S.*—Yardley v. Torr, 67 Fed. 857; Schlesinger v. Kansas City, etc., R. Co., 39 Fed. 741; Alexander v. Todd, 1 Fed. Cas. No. 175, 1 Bond. 175.

Ark.—Dennis v. Ball-Warren Commission Co. (1903), 77 S. W. 903.

Ky.—Heiatt v. Barnes, 5 Dana, 219.

Me.—Spear v. Spear, 97 Me. 498, 54 Atl. 1106.

Mich.—Cicotte v. Gagnier, 2 Mich. 381.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 840, and the grantee is not protected by a recital of consideration in the deed; Woodson v. Poole, 19 Mo. 340; Farmers', etc., Bank v. Price, 41 Mo. App. 291.

Or.—Marks v. Crow, 14 Or. 382, 13 Pac. 55.

Tex.—Donnebaum v. Tinsley, 54 Tex. 362; Reynolds v. Lansford, 16 Tex. 286.

Vt.—Farmers' Nat. Bank v. Thompson, 74 Vt. 442, 52 Atl. 961; Durkee v. Mahoney, 1 Aikens, 116.

Eng.—In re Ridler, 22 Ch. D. 74, 47 L. P. 479, 52 L. J. Ch. 343, 48 L. T. Rep. N. S. 396, 31 Wkly. Rep. 93. See also What constitutes insolvency, chap. VII, § 10, *supra*.

6. *U. S.*—Washington Cent. Nat. Bank v. Hume, 128 U. S. 195, 9 Sup.

An actual intent to defraud is not necessary to render a voluntary conveyance void as to existing creditors.⁷ The motive which prompts the person to make the gift is wholly immaterial.⁸ A voluntary conveyance is void as to existing creditors, though there was no fraudulent intent in making it.⁹ Without regard to the

Ct. 41, 32 L. Ed. 370; *Kehr v. Smith*, 20 Wall. 31, 22 L. Ed. 213; *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454.

Conn.—*Abbe v. Newton*, 19 Conn. 20; *Whittlesey v. McMahon*, 10 Conn. 137, 26 Am. Dec. 398; *Salmon v. Bennett*, 1 Conn. 525, 7 Am. Dec. 237.

Ill.—*Emerson v. Bemis*, 69 Ill. 537.

Kan.—*Miller v. Wilkerson*, 10 Kan. App. 576, 62 Pac. 253.

Me.—*Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240.

Md.—*Kipp v. Hanna*, 2 Bland. 26.

Pa.—*Kelly's Appeal*, 77 Pa. St. 232; *Townsend v. Maynard*, 45 Pa. St. 198; *Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717; *Wilson v. Hawser*, 12 Pa. St. 109.

Va.—*Wilson v. Buchanan*, 7 Gratt. 334.

Eng.—*Cornish v. Clark*, L. R. 14 Eq. 184, 42 L. J. Ch. 14, 26 L. T. Rep. N. S. 494, 20 Wkly. Rep. 897; *Denison v. Tattersall*, 18 L. T. Rep. N. S. 303; *French v. French*, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint, 1166.

Can.—*Goodwin v. Williams*, 5 Grant Ch. (U. C.) 539.

7. *U. S.*—*Parish v. Murphree*, 13 How. 92, 14 L. Ed. 65.

Conn.—*Quinnipiac Braning Co. v. Fitzgibbon*, 71 Conn. 80, 40 Atl. 913.

Me.—*Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 2.

Mich.—*Walker v. Cady*, 106 Mich. 21, 63 N. W. 1005; *Felker v. Chubb*, 90 Mich. 24, 51 N. W. 110; *Matson*

v. Melchor, 42 Mich. 477, 4 N. W. 200; *Fellers v. Smith*, 40 Mich. 689.

Mo.—*McCullum v. Crain*, 101 Mo. App. 522, 74 S. W. 650; *Headley Grocer Co. v. Walker*, 69 Mo. App. 553; *Loehr v. Murphy*, 45 Mo. App. 519.

Ohio.—*Kennedy v. Dodge*, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

8. *Thompson v. Crane*, 73 Fed. 327.

9. *N. Y.*—*White's Bank v. Farthing*, 10 St. Rep. 830; *Loeschigk v. Addison*, 19 Abb. Pr. 169.

Ala.—*Early v. Owens*, 68 Ala. 171; *Anderson v. Anderson*, 64 Ala. 403; *McAnally v. O'Neal*, 56 Ala. 299; *Crawford v. Kirksey*, 55 Ala. 282, 27 Am. Rep. 704.

Ark.—*Hershy v. Latham*, 46 Ark. 542.

Del.—*Russell v. Thatcher*, 2 Del. Ch. 320.

Fla.—*McKeown v. Allen*, 37 Fla. 490, 20 So. 556.

Ill.—*Head v. Harding*, 166 Ill. 353, 46 N. E. 890, *aff'd* 62 Ill. App. 302; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460.

Ind.—*Heaton v. Shanklin*, 115 Ind. 595, 18 N. E. 172.

Ky.—*Ward v. Thomas*, 81 Ky. 452; *Miller v. Desha*, 66 Ky. 212; *Mitchell v. Berry*, 58 Ky. 602; *Enders v. Williams*, 58 Ky. 346; *Hanson v. Buckner*, 34 Ky. 251, 29 Am. Dec. 401.

Me.—*Emery v. Vinall*, 26 Me. 295.

Md.—*Goodman v. Wineland*, 61

intent of the parties, and even where there is no fraudulent intent, a conveyance by a grantor who was greatly indebted or financially embarrassed at the time, or where the nature of the gift was unreasonable, considering the grantor's circumstances and condition in life, disproportioned to his property, and left property insufficient for the payment of his debts, is fraudulent and void as to creditors.¹⁰

Md. 449; *Dorn v. Bayer*, 16 *Md.* 144.

Mass.—*Blake v. Sawin*, 92 *Mass.* 340.

Miss.—*Young v. White*, 25 *Miss.* 146; *Swayze v. McCrossin*, 21 *Miss.* 317

Mo.—*Bohannon v. Combs*, 79 *Mo.* 305; *Payne v. Stanton*, 59 *Mo.* 158; *Patten v. Casey*, 57 *Mo.* 118; *Farmers', etc., Bank v. Price*, 41 *Mo.* App. 291.

Neb.—*Smith v. Schmitz*, 10 *Neb.* 600, 7 *N. W.* 329.

N. J.—*Bouquet v. Heyman*, 50 *N. J. Eq.* 114, 24 *Atl.* 266; *City Nat. Bank v. Hamilton*, 34 *N. J. Eq.* 158; *Haston v. Castner*, 31 *N. J. Eq.* 697; *Morris Canal, etc., Co. v. Stearns*, 23 *N. J. Eq.* 414.

N. C.—*Lassiter v. Davis*, 64 *N. C.* 498; *Green v. Kornegay*, 49 *N. C.* 66, 67 *Am. Dec.* 261.

R. I.—*McKenna v. Crowley*, 16 *R. I.* 364, 17 *Atl.* 354.

S. C.—*Backham v. Secrest*, 2 *Rich Eq.* 54; *Blake v. Jones*, 1 *Bailey Eq.* 141, 21 *Am. Dec.* 530.

W. Va.—*Lockhard v. Beckley*, 10 *W. Va.* 87.

10. *N. Y.*—*Holmes v. Clark*, 48 *Barb.* 237.

U. S.—*Hinde v. Longworth*, 11 *Wheat.* 199, 6 *L. Ed.* 454.

Ark.—*Wright v. Campbell*, 27 *Ark.* 637; *Smith v. Yell*, 8 *Ark.* 470; *Dodd v. McCraw*, 8 *Ark.* 83, 46 *Am. Dec.* 301.

Conn.—*Salmon v. Bennett*, 1 *Conn.* 525, 7 *Am. Dec.* 237.

Ill.—*Stevens v. Dillman*, 86 *Ill.* 233; *Austin v. First Nat. Bank*, 47 *Ill. App.* 224; *Russell v. Fanning*, 2 *Ill. App.* 632.

Ind.—*Burtch v. Elliott*, 3 *Ind.* 99. *Iowa.*—*Gameet v. Simmons*, 103 *Iowa*, 163, 72 *N. W.* 444.

Ky.—*Trimble v. Ratcliff*, 9 *B. Mon.* 511; *Adams v. Branch*, 3 *Ky. L. Rep.* 178.

Me.—*Wheelden v. Wilson*, 44 *Me.* 11.

Md.—*Benson v. Benson*, 70 *Md.* 253, 16 *Atl.* 657; *Biddinger v. Wiland*, 67 *Md.* 359, 10 *Atl.* 202; *Richards v. Swan*, 7 *Gill*, 366.

Mo.—*Snyder v. Free*, 114 *Mo.* 360, 21 *S. W.* 847; *Donovan v. Dunning*, 69 *Mo.* 436; *Dunlap v. Mitchell*, 80 *Mo. App.* 393.

N. J.—*Den v. Lippencott*, 6 *N. J. L.* 473.

N. C.—*Burton v. Farinholt*, 86 *N. C.* 260; *Black v. Coldwell*, 49 *N. C.* 150.

Ohio.—*Humbert v. Cincinnati M. E. Church, Wright*, 213.

Pa.—*Kern's Estate*, 4 *Pa. Dist.* 73.

Tenn.—*Carpenter v. Scales* (*Ch. App.* 1897), 48 *S. W.* 249.

Tex.—*Van Bibber v. Mathis*, 52 *Tex.* 406.

Va.—*Coleman v. Cocke*, 6 *Rand.* 618, 18 *Am. Dec.* 757.

§ 34. **Conveyance in accordance with prior parol gift.**—A parol gift of land, made by a parent to his child, is void and confers no right that can be enforced either at law or in equity. If subsequently, a deed be executed in consummation of the gift, it is voluntary; it takes effect from the time of its execution, and cannot prejudice the rights of existing creditors.¹¹ A voluntary conveyance by a grantor to his children, made when indebted, is not valid, though in compliance with a previous verbal promise made when unembarrassed.¹² Where, however, a father, in solvent circumstances, made an oral gift of land to a son, and the son entered into possession and made valuable improvements, it was held that the son's title in equity was paramount to that of the father's subsequent creditors.¹³ And the removal of a son to certain land, on the faith of a promise by his father to give him the land, the father being at that time solvent, and the parting with that land afterwards by the son for the purpose of effecting an exchange, was held to be a valuable consideration to support a conveyance by the father to the son of other lands, even though at the time of the latter conveyance the father had become insolvent.¹⁴

§ 35. **Statutory rule.**—In some jurisdictions the statute prescribes that the fraudulent intent to hinder, delay and defraud creditors by a conveyance of property shall be deemed a question of fact and not of law, and that no conveyance shall be adjudged fraudulent as against creditors solely upon the ground that it was voluntary or not founded upon a valuable consideration.¹⁵ In other jurisdictions the statute provides that every

11. *Hubbard v. Abell*, 59 Ala. 283.

12. *Rucker v. Abell*, 8 B. Mon. (Ky.) 566.

13. *Dozier v. Matson*, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388; *Layton v. Bank of Calhoun*, 22 Ky. L. Rep. 872, 59 S. W. 322, on failure to prove the parol agreement, a judg-

ment setting aside the deed was proper.

14. *Rumbold v. Parr*, 51 Mo. 592.

15. N. Y.—*Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Fuller Electrical Co. v. Lewis*, 101 N. Y. 674, 5 N. E. 37; *Genesee River*

conveyance made by a debtor of any of his estate without valuable consideration therefor shall be void as to all his then existing creditors.¹⁶ Under the latter statute the fact that at the time of the conveyance the debtor had other property subject to

Nat. Bank v. Mead, 92 N. Y. 637; Carr v. Breese, 81 N. Y. 584; Cole v. Tyler, 65 N. Y. 73; Holden v. Hurnham, 63 N. Y. 74; Dunlap v. Hawkins, 59 N. Y. 342; Erickson v. Quinn, 47 N. Y. 410; Dygert v. Remerschnider, 32 N. Y. 629; Babcock v. Eckler, 24 N. Y. 623; Carpenter v. Roe, 10 N. Y. 227; Multz v. Price, 82 App. Div. 339, 81 N. Y. Supp. 931; Saugerties Bank v. Mack, 34 App. Div. 494, 54 N. Y. Supp. 360; Royer Wheel Co. v. Fielding, 31 Hun, 274; Emmerich v. Hefferan, 53 N. Y. Super. Ct. 98; White's Bank v. Farthing, 10 St. Rep. 830.

Cal.—Cook v. Cockins, 117 Cal. 140, 48 Pac. 1025; Knox v. Moses, 104 Cal. 502, 38 Pac. 318; Threlkel v. Scott (1893), 34 Pac. 851; McFadden v. Mitchell, 54 Cal. 628; Thornton v. Hook, 36 Cal. 223; Swartz v. Haslett, 8 Cal. 118; Gillan v. Metcalf, 7 Cal. 137.

Colo.—Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Burdsall v. Waggoner, 4 Colo. 256; Thomas v. Mackey, 3 Colo. 390.

Ind.—Emerson v. Opp, 139 Ind. 27, 38 N. E. 330; Heaton v. Shanklin, 115 Ind. 595, 18 N. E. 172; Cavanaugh v. Smith, 84 Ind. 380; Bishop v. State, 83 Ind. 67; Dunn v. Dunn, 82 Ind. 42; Wooters v. Osborn, 77 Ind. 513; Hardy v. Mitchell, 67 Ind. 485; Pence v. Croan, 51 Ind. 336; Parton v. Pates, 41 Ind. 456; Frank v. Kessler, 30 Ind. 8; Hubbs v. Bancroft, 4 Ind. 388.

N. C.—Mitchell v. Eure, 126 N. C.

77, 35 S. E. 190; Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482; Taylor v. Eatman, 92 N. C. 601; Worthly v. Brady, 91 N. C. 265.

Wis.—Hyde v. Chapman, 33 Wis. 391.

16. Ky.—O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711, 21 Ky. L. Rep. 1551; Yankee v. Sweeney, 85 Ky. 55, 8 Ky. L. Rep. 944, 2 S. W. 559; Ward v. Thomas, 81 Ky. 452; Stokes v. Coffee, 71 Ky. 523; Miller v. Desha, 66 Ky. 212; Lowry v. Fisher, 65 Ky. 70, 92 Am. Dec. 475; Todd v. Hartley, 59 Ky. 206; Mitchell v. Berry, 58 Ky. 602; Enders v. Williams, 58 Ky. 346; Rucker v. Abell, 47 Ky. 566, 48 Am. Dec. 406; Hanson v. Buckner, 34 Ky. 251, 29 Am. Dec. 401; Beatty v. Thompson, 23 Ky. L. Rep. 1850, 66 S. W. 384; Hamilton v. Combs, 22 Ky. L. Rep. 1263, 60 S. W. 371; Porter v. Green, 10 Ky. L. Rep. 484, 9 S. W. 401; Marcum v. Powers, 10 Ky. L. Rep. 380, 9 S. W. 255; Dougherty v. Halloran, 9 Ky. L. Rep. 768, 6 S. W. 718; McElrath v. Spillman, 7 Ky. L. R. 308; Leavell v. Leavell, 4 Ky. L. R. 489.

Va.—Davis v. Anderson, 99 Va. 620, 39 S. E. 588; Norris v. Jones, 93 Va. 176, 24 S. E. 911; Bickle v. Chrisman, 76 Va. 678; Fink v. Denny, 75 Va. 663.

W. Va.—Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587; McCue v. McCue, 41 W. Va. 151, 23 S. E. 689; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847.

execution, more than sufficient to pay his debts, constitutes no defence.¹⁷ But in West Virginia a husband may make a donation to his wife, or return her a loan of money augmented by a portion of the profits of a business conducted by him, if he retains an amount of tangible property largely in excess of his just indebtedness, notwithstanding the statute.¹⁸

§ 36. Voluntary conveyances as to subsequent creditors.—

A voluntary conveyance is not fraudulent and void as to a subsequent creditor of the grantor, unless actual fraud is shown. Subsequent creditors can impeach a voluntary conveyance only by proving the existence of an actual intent in the minds of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means thereof.¹⁹ In some juris-

17. *Townsend v. Wilson*, 114 Ky. 504, 24 Ky. L. Rep. 1276, 71 S. W. 440.

18. *Hume & W. Co. v. Condon*, 44 W. Va. 553, 30 S. E. 556; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. 59.

19. *N. Y.*—*Phoenix Bank v. Stafford*, 89 N. Y. 405; *Shand v. Hanley*, 71 N. Y. 319; *Phillips v. Wooster*, 36 N. Y. 412; *Ebbitt v. Dunham*, 25 Misc. Rep. 232, 55 N. Y. Supp. 78; *Lormore v. Campbell*, 60 Barb. 62; *Loeschigk v. Addison*, 4 Abb. Pr. N. S. 210, 19 Abb. Pr. 169; *Barnum v. Farthing*, 40 How. Pr. 25.

U. S.—*Graham v. LaCrosse, etc.*, R. Co., 102 U. S. 148, 26 L. Ed. 106; *Hinde v. Longworth*, 11 Wheat. 199, 6 L. Ed. 454; *Sexton v. Wheaton*, 8 Wheat. 229, 5 L. Ed. 603; *Metropolitan Nat. Bank v. Rogers*, 47 Fed. 148; *Burdick v. Gill*, 7 Fed. 668, 2 McCrary, 486; *Herring v. Richards*, 3 Fed. 439, 1 McCrary, 570; *Sedgwick v. Place*, 21 Fed. Cas. No. 12,621, 12 Blatchf. 163.

Ala.—*Allen v. Caldwell, Ward &*

Co. (1906), 42 So. 855; *Wilson v. Stevens*, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86; *Elyton Land Co. v. Iron City Steam Bottling Works*, 109 Ala. 602, 20 So. 51; *Seals v. Robinson*, 75 Ala. 363; *Lockard v. Nash*, 64 Ala. 385; *Kirksey v. Snedecor*, 60 Ala. 192; *Davidson v. Lanier*, 51 Ala. 318; *Stiles v. Lightfoot*, 26 Ala. 443; *Randall v. Lang*, 23 Ala. 751; *Thomas v. Degraffenreid*, 17 Ala. 602.

Ark.—*Crampton v. Schaap*, 56 Ark. 253, 19 S. W. 669; *Rudy v. Austin*, 56 Ark. 73, 19 S. W. 111, 35 Am. St. Rep. 85.

Cal.—*Buch, etc., Co. v. Helbing*, 134 Cal. 676, 66 Pac. 967; *Kane v. Desmond*, 63 Cal. 464; *Wells v. Stout*, 9 Cal. 479.

Colo.—*Wilcoxon v. Morgan*, 2 Colo. 473.

Conn.—*Whiting v. Ralph*, 75 Conn. 41, 52 Atl. 406; *Smith v. Gaylord*, 47 Conn. 380; *Converse v. Hartley*, 31 Conn. 372; *Benton v. Jones*, 8 Conn. 186. *Compare* *State v. Martin*, 77 Conn. 142, 58 Atl. 745; *Barbour v.*

dictions it is held that where a voluntary conveyance is made and

Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Fla.—Florida L. & T. Co. v. Crabb (1903), 33 So. 523.

Ga.—Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 621.

Ill.—Higley v. American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436; Faloon v. McIntyre, 118 Ill. 292, 8 N. E. 315; Durand v. Weightman, 108 Ill. 489; Lucas v. Lucas, 103 Ill. 121; Jackson v. Miner, 101 Ill. 550; Tunison v. Chamblin, 88 Ill. 378; Lincoln v. McLaughlin, 74 Ill. 11; Bridgford v. Riddell, 55 Ill. 261; Mixell v. Lutz, 34 Ill. 382; Carter v. Lewis, 29 Ill. 500; Lamont v. Regan, 96 Ill. App. 359; Hunt v. Connor, 74 Ill. App. 298; Racine Wagon, etc., Co. v. Roberts, 54 Ill. App. 515; Sweet v. Dean, 43 Ill. App. 650; Edgerly v. First Nat. Bank, 30 Ill. App. 425. But see Morrill v. Kilner, 113 Ill. 318.

Ind.—Stumph v. Bruner, 89 Ind. 556.

Iowa.—King v. Wells, 106 Iowa, 649, 77 N. W. 338; Carbiener v. Montgomery, 97 Iowa, 659, 66 N. W. 900; Hook v. Mowre, 17 Iowa, 195.

Kan.—Voorhis v. Michaelis, 45 Kan. 255, 25 Pac. 592.

Ky.—Place v. Rhem, 70 Ky. 585; Duhme v. Young, 66 Ky. 343; Hurdt v. Courtenay, 61 Ky. 139; Enders v. Williams, 58 Ky. 346; Hanson v. Buckner, 34 Ky. 251, 29 Am. Dec. 401; Cosby v. Ross, 26 Ky. 290, 20 Am. Dec. 140; Hunt v. Nance, 28 Ky. L. Rep. 1188, 92 S. W. 6; Rose v. Campbell, 25 Ky. L. Rep. 885, 1263, 76 S. W. 505, 77 S. W. 707; Little v. Ragan, 7 Ky. L. Rep. 391; Fletcher v. Harl, 3 Ky. L. Rep. 335.

La.—Hopkins v. Buck, 5 La. Ann. 487; Brunet v. Duvergis, 5 La. 124; Morgan v. Davis, 4 La. 141; Henry v. Hyde, 5 Mart. N. S. 633; Hesser v. Black, 5 Mart. N. S. 96.

Me.—Davis v. Herrick, 37 Me. 397; Howe v. Ward, 4 Me. 195.

Md.—Miller v. Johnson, 27 Md. 6; Ward v. Hollins, 14 Md. 158; Bohn v. Headley, 7 Harr. & J. 257.

Mich.—Barkworth v. Palmer, 118 Mich. 50, 76 N. W. 151; Cole v. Brown, 114 Mich. 396, 72 N. W. 247, 68 Am. St. Rep. 491.

Miss.—Pennington v. Seal, 49 Miss. 518.

Mo.—Welch v. Mann, 193 Mo. 304, 92 S. W. 98; Krueger v. Vorhauer, 164 Mo. 156, 63 S. W. 1098; Caldwell v. Smith, 88 Mo. 44; Payne v. Stanton, 59 Mo. 158; Pepper v. Carter, 11 Mo. 540; Baker v. Welch, 4 Mo. 484; Loy v. Rorick, 100 Mo. App. 105, 71 S. W. 842; Bracken v. Milner, 99 Mo. App. 187, 73 S. W. 225; Bauer Grocery Co. v. Smith, 74 Mo. App. 419; Boatman's Sav. Bank v. Overall, 16 Mo. App. 510; Mittelburg v. Harrison, 11 Mo. App. 136; Mutual L. Ins. Co. v. Sandfelder, 9 Mo. App. 285.

Neb.—Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019; Ayers v. Wolcott, 66 Neb. 712, 92 N. W. 1036; Racek v. First Nat. Bank, 62 Neb. 669, 87 N. W. 542; Wake v. Griffin, 9 Neb. 47, 2 N. W. 461.

N. H.—Coolidge v. Melvin, 42 N. H. 510; Smyth v. Carlisle, 16 N. H. 464; Carlisle v. Rich, 8 N. H. 44.

N. J.—Kinsey v. Feller, 64 N. J. Eq. 367, 51 Atl. 485; Minzesheimer v. Doolittle, 56 N. J. Eq. 206, 39 Atl. 386; Long Branch Banking Co. v. Dennis, 56 N. J. Eq. 549, 39 Atl. 689;

received with actual intent to defraud then existing creditors of the grantor, it is not a *bona fide* conveyance which can protect the

Bouquet v. Heyman, 50 N. J. Eq. 114, 24 Atl. 266; Burne v. Kunzman (Ch. 1900), 19 Atl. 667; Campbell v. Tompkins, 32 N. J. Eq. 170; Carpenter v. Carpenter, 27 N. J. Eq. 502.

N. C.—Clement v. Cozart, 109 N. C. 173, 13 S. E. 862.

N. D.—Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880.

Ohio.—Creed v. Lancaster Bank, 1 Ohio St. 1; Robinson v. Von Dolecke, 3 Ohio S. & C. Pl. Dec. 107, 1 Ohio N. P. 429.

Or.—Seed v. Jennings (1905), 83 Pac. 872; Morton v. Denham, 39 Or. 227, 64 Pac. 384.

Pa.—Best v. Smith, 193 Pa. St. 89, 44 Atl. 329, 74 Am. St. Rep. 676; Reese v. Reese, 157 Pa. St. 200, 27 Atl. 703; Staller v. Kirkpatrick, 1 Mona. 486; Lieber v. Lieber, 17 Mont. Co. Rep. 34; Tatham v. Crawford, 2 Wkly. Notes Cas. 365.

S. C.—Gentry v. Lanneau, 54 S. C. 514, 32 S. E. 523, 71 Am. St. Rep. 814; Jackson v. Phyler, 38 S. C. 496, 17 S. E. 255, 37 Am. St. Rep. 782; Walker v. Bollman, 22 S. C. 512; Richardson v. Rhodus, 14 Rich. 95; Footman v. Pendergrass, 3 Rich. Eq. 33; Brock v. Bowman, Rich. Eq. Cas. 185; King v. Clarke, 2 Hill Eq. 611; Blake v. Jones, Bailey Eq. 141, 21 Am. Dec. 530; Henderson v. Dodd, Bailey Eq. 138; Smith v. Littlejohn, 2 McCord, 362.

S. D.—Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

Tenn.—Nelson v. Venden, 99 Tenn. 224, 42 S. W. 5; Hickman v. Perrin, 46 Tenn. 135; Nicholas v. Ward, 38 Tenn. 323, 73 Am. Dec. 177; Dillard

v. Dillard, 22 Tenn. 41; Hamilton v. Bradley, 5 Hayw. 127. *Compare* Trezevant v. Terrell, 96 Tenn. 528, 33 S. W. 109; Hester v. Wilkinson, 25 Tenn. 215, 44 Am. Dec. 303.

Tex.—Moulton v. Sturgis Nat. Bank (Civ. App. 1901), 65 S. W. 1114; O'Neal v. Clymer (Civ. App. 1900), 61 S. W. 545; Heath v. First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123.

Vt.—Fair Haven Marble, etc., Co. v. Owens, 69 Vt. 246, 37 Atl. 749; McLane v. Johnson, 43 Vt. 48; Church v. Chapin, 35 Vt. 223.

Va.—New South Bldg., etc., Assoc. v. Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; Johnston v. Zane, 11 Gratt. 552; Davis v. Payne, 4 Rand. 332.

W. Va.—Enslow v. Sliger, 51 W. Va. 405, 41 S. E. 173; Bronson v. Vaughn, 44 W. Va. 406, 29 S. E. 1022; Green v. O'Brien, 36 W. Va. 277, 15 S. E. 74; McLaugherty v. Morgan, 36 W. Va. 191, 14 S. E. 992; Rogers v. Verlander, 30 W. Va. 619, 5 S. E. 847; Rose v. Brown, 11 W. Va. 122; Lockhard v. Beckley, 10 W. Va. 87.

Wis.—Wheeler, etc., Mfg. Co. v. Monahan, 63 Wis. 198, 23 S. W. 127.

Eng.—Russel v. Hammond, 1 Atk. 13, 26 Eng. Reprint, 9; Holmes v. Penny, 3 Jur. N. S. 80, 3 Kay. & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132; Spirett v. Willows, 10 L. T. Rep. N. S. 450; Holloway v. Millard, 1 Madd. 414, 56 Eng. Reprint, 152; Battersbee v. Farrington, 1 Swanst. 106, 36 Eng. Reprint, 317, 1 Wils. Ch. 88, 18 Rev. Rep. 32, 37 Eng. Reprint, 40; George v. Milbanks, 9 Ves. Jr. 190, 7 Rev. Rep. 157, 32

grantee against claims of subsequent creditors.²⁰ In other jurisdictions the contrary rule is maintained.²¹ A voluntary conveyance, made by a debtor with the actual intent to defraud subsequent creditors, is fraudulent and void as to them.²² To render a

Eng. Reprint, 575; Townshend v. Windham, 2 Ves. 1, 28 Eng. Reprint, 1; Meggison v. Forster, 7 Jur. 546, 12 L. J. Ch. 415, 2 Y. & Coll. 336, 21 Eng. Ch. 336.

Subsequent purchaser.—A voluntary conveyance, made in good faith by a person not indebted at the time, to his child, is valid as against a subsequent purchaser from the grantor with notice of the conveyance. Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348.

20. N. Y.—King v. Wilcox, 11 Paige, 589; Partridge v. Stokes, 66 Barb. 586.

Ala.—Heintz v. White, 105 Ala. 670, 17 So. 185; Huggins v. Perrine, 30 Ala. 396, 68 Am. Dec. 131.

Ark.—May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431; Toney v. McGehee, 38 Ark. 419; Dodd v. McCraw, 8 Ark. 83, 46 Am. Dec. 301.

Conn.—State v. Martin, 77 Conn. 142, 58 Atl. 745; Barbour v. Connecticut Mut. L. Ins. Co., 61 Conn. 240, 23 Atl. 154.

Me.—Marston v. Marston, 54 Me. 476.

Mass.—Brooks v. Dalrymple, 12 Allen, 102; Thacher v. Phinney, 7 Allen, 146.

Tenn.—Nelson v. Vanden, 99 Tenn. 224, 42 S. W. 5.

21. U. S.—Schreyer v. Platt, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955.

Miss.—Simmons v. Ingram, 60 Miss. 886, *overruling* Vertner v. Humphreys, 22 Miss. 130; Henry v. Fullerton, 21 Miss. 631.

Mo.—Welch v. Mann, 193 Mo. 304, 92 S. W. 98; Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624.

Neb.—State Bank v. Frey, 3 Neb. (Unoff.) 83, 91 N. W. 239.

Pa.—Kimble v. Smith, 95 Pa. St. 69; Harlan v. Maglaughlin, 90 Pa. St. 293.

Va.—New South Bldg., etc., Assoc. v. Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858.

The Texas statute provides that a voluntary conveyance shall not be void as to subsequent creditors merely because it is void as to prior creditors. Lewis v. Simon, 72 Tex. 470, 10 S. W. 554.

22. U. S.—Horbach v. Hill, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. Ed. 670; Burdick v. Gill, 7 Fed. 668, 2 McCrary, 486; United States v. Stiner, 28 Fed. Cas. No. 16,404, 8 Blatchf. 544.

Ark.—May v. State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

Cal.—Bush, etc., Co. v. Helbing, 134 Cal. 676, 66 Pac. 967.

D. C.—Holladay v. Towers, 20 D. C. 577; Walter v. Lane, 1 MacArthur, 275.

Ind.—Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300; Barrow v. Barrow, 108 Ind. 345, 9 N. E. 371.

Kan.—McPherson v. Kingsbaker, 22 Kan. 646.

Me.—Laughton v. Harden, 68 Me. 208; Marston v. Marston, 54 Me. 476; Pullen v. Hutchinson, 25 Me. 249.

Md.—Matthai v. Heather, 57 Md. 483.

voluntary conveyance fraudulent as to subsequent creditors, it must appear that it was made by the grantor in contemplation of future indebtedness, with the intent to contract and continue future indebtedness, and to avoid payment of his debts by placing his property beyond the reach of those who should give him such future credit,²³ or that there was intentional fraud contemplated by the grantor in the creation of future debts.²⁴ A voluntary conveyance, made when the grantor is about to enter upon a new and hazardous business, or with a view to incurring liabilities, which are contracted soon after the conveyance, is presumed to

Miss.—Wynne v. Mason, 72 Miss. 424, 18 So. 422; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412.

Mo.—Boatmen's Sav. Bank v. Over-all, 90 Mo. 410, 3 S. W. 64, *aff'g* 16 Mo. App. 510.

N. H.—Carlisle v. Rich, 8 N. H. 44.

Ohio.—Evans v. Lewis, 30 Ohio St. 11; Bowlus v. Shanabarger, 19 Ohio Cir. Ct. 137, 10 Ohio Civ. Dec. 167.

Pa.—Haak's Appeal, 100 Pa. St. 59; Murphy v. Solens, 6 Pa. Co. Ct. 264; Andress v. Lewis, 1 Pa. Co. Ct. 293, 17 Wkly. N. Cas. 270; Connell's Estate, 13 Phila. 393.

Tenn.—Churchill v. Wells, 47 Tenn. 364.

Tex.—Rives v. Stephens (Civ. App. 1894), 28 S. W. 707.

W. Va.—Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812. See also cases cited in note 19, *supra*.

23. *N. Y.*—Savage v. Murphy, 34 N. Y. 508, 90 Am. Dec. 733, *aff'g* 8 Bosw. 75.

U. S.—Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

Ala.—Echols v. Orr, 106 Ala. 237, 17 So. 677.

Colo.—Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614.

Ill.—Morrill v. Kilner, 113 Ill. 318; Bridgford v. Riddell, 55 Ill. 261; Bay v. Cook, 31 Ill. 336; Cramer v. Bode, 24 Ill. App. 219.

Kan.—First Nat. Bank v. Jaffray, 41 Kan. 694; 21 Pac. 242.

Ky.—Haskell v. Bakewell, 49 Ky. 206.

Mo.—Kinealy v. Macklin, 89 Mo. 433, 14 S. W. 507; Fisher v. Lewis, 69 Mo. 629.

N. J.—City Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Carpenter v. Carpenter, 25 N. J. Eq. 194; Cramer v. Reford, 17 N. J. Eq. 367, 90 Am. Dec. 594; Beekman v. Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

Pa.—Buckley v. Duff, 114 Pa. St. 596, 8 Atl. 188; Haak's Appeal, 100 Pa. St. 59; Bonslough v. Bonslough, 68 Pa. St. 495; Waterson v. Wilson, 1 Grant Cas. 74; In re Greenfield's Estate, 14 Pa. St. 489.

S. C.—Cohen v. Meyer, 19 S. C. 190; Kidd v. Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tenn.—Churchill v. Wells, 47 Tenn. 364; Hickman v. Perrin, 46 Tenn. 135; Russell v. Stinson, 4 Tenn. 1.

24. Walker v. Lane, 1 MacArthur (D. C.), 275.

be made with intent to defraud subsequent creditors and may be set aside by them as fraudulent.²⁵ But unless a voluntary conveyance was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowledge of it was withheld from such creditors who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with the view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in a new business, such a conveyance is good as against subsequent creditors.²⁶ A voluntary conveyance is valid as against subsequent creditors, when it does not appear, as one step in a fraudulent design, that it was made with the deliberate purpose to put the property beyond the reach of debts which the grantor then intended to contract;²⁷ or where although it was the intent of the grantor to enter into a hazardous business, he did not in fact enter into such business.²⁸ A mere expectation of future indebtedness, or an intent to contract debts, not coupled with a purpose to convey the property to keep it from the reach of creditors, it not within the letter or spirit of the statutes, and will not avoid the conveyance as against subsequent creditors.²⁹

§ 37. **Insufficiency or inadequacy of consideration.**—Mere inadequacy of price or consideration unattended by other circum-

25. *N. Y.*—*Case v. Phelps*, 39 N. Y. 164; *Carr v. Breese*, 18 Hun. 134.

U. S.—*Ridgeway v. Underwood*, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

Mo.—*Fisher v. Lewis*, 69 Mo. 629.

Neb.—*Ayers v. Wolcott*, 62 Neb. 805, 87 N. W. 906.

N. J.—*Hildebrand v. Willig*, 64 N. J. Eq. 249, 53 Atl. 1035; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158.

Pa.—*Buckley v. Duff*, 114 Pa. St. 956, 8 Atl. 188; *Monroe v. Smith*, 79 Pa. St. 459; *Appeal of Woolston*, 51 Pa. St. 452; *Mullen v. Wilson*, 44 Pa.

St. 413, 84 Am. Dec. 461; *Snyder v. Christ*, 39 Pa. St. 499; *Thomson v. Dougherty*, 12 Serg. & R. 448.

26. *Neuberger v. Klein*, 134 N. Y. 35, 31 N. E. 268, *aff'd* 53 Hun. 60, 5 N. Y. Supp. 94; *Todd v. Nelson*, 109 N. Y. 316, 16 N. E. 360; *Schreyer v. Scott*, 134 U. S. 411.

27. *Hilton v. Morse*, 75 Me. 258.

28. *Williams v. Davis*, 69 Pa. St. 21.

29. *Snyder v. Christ*, 39 Pa. St. 499; *In re Connell's Estate*, 13 Phila. (Pa.) 393, fraud intended against the creditor must be shown.

stances casting suspicion upon the fairness of the transaction, is not sufficient proof to establish fraud in a sale or conveyance, as against creditors.³⁰ A debtor may sell his property to pay his debts for such consideration as he may agree to accept, and, if there is nothing illegal in the transaction and no fraudulent purpose involved it will be good as against creditors.³¹ Inadequacy of consideration is a badge and evidence of fraud.³² Where

30. *N. Y.*—Jaeger v. Kelley, 52 N. Y. 274; O'Connor v. Docen, 50 App. Div. 610, 64 N. Y. Supp. 206; Andree v. Bourke, 33 App. Div. 638, 53 N. Y. Supp. 885; Hardt v. Deutsch, 22 Misc. Rep. 66, 48 N. Y. Supp. 564.

U. S.—Kempner v. Churchill, 8 Wall. 362, 19 L. Ed. 461.

Conn.—Washband v. Washband, 27 Conn. 424.

D. C.—Clark v. Krause, 2 Mackey, 559.

Ga.—Sharp v. Hicks, 94 Ga. 624, 21 S. E. 208.

Ill.—Klemm v. Bishop, 56 Ill. App. 613.

Iowa.—Rusie v. Jameson, 62 Iowa, 52, 17 N. W. 103.

Ky.—Talbot v. Hooser, 12 Bush, 408.

La.—Montgomery v. Wilson, 31 La. Ann. 196; Keller v. Blanchard, 19 La. Ann. 53.

Md.—Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375. But see Worthington v. Bullitt, 6 Md. 172.

Miss.—Foster v. Pugh, 20 Miss. 416.

Mo.—Lionberger v. Baker, 88 Mo. 447; Nelson Distilling Co. v. Vossmeier, 25 Mo. App. 578; Demuth v. Boehler, 11 Mo. App. 588.

Mont.—Mueller v. Renkes (1904), 77 Pac. 512; Maloy v. Berkin, 11 Mont. 138, 27 Pac. 442.

N. J.—Hudnit v. Tomson, 26 N. J. Eq. 239.

N. C.—Wachonia Loan, etc., Co. v. Forbes, 120 N. C. 355, 27 S. E. 43.

Ohio.—Jones v. Leeds, 10 Ohio, S. & C. Pl. Dec. 173, 7 Ohio N. P. 480.

Or.—Brown v. Case, 41 Oreg. 221, 69 Pac. 43.

Pa.—Goddard v. Weil, 165 Pa. St. 419, 30 Atl. 1000, 36 Wkly. N. Cas. 98; Shatz v. Kirker, 1 Pa. Cas. 332, 2 Atl. 93.

S. C.—McPherson v. McPherson, 21 S. C. 261.

Tex.—Moore v. Lowery, 27 Tex. 541.

Va.—Sutherlin v. March, 75 Va. 223; Moore v. Triplett (1885), 23 S. E. 69.

W. Va.—Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804.

Eng.—Blount v. Blount, 3 Atk. 481, 26 Eng. Reprint, 1076.

31. Lowery v. Howard, 35 Ind. 170, 9 Am. Rep. 676; Frank v. Peters, 9 Ind. 343; Hubbs v. Bancroft, 4 Ind. 388; Rosenheimer v. Krenn, 126 Wis. 617, 106 N. W. 20. *Compare* Farmers' Bank of Virginia v. Douglass, 11 Sm. & M. (Miss.) 469.

32. *N. Y.*—First Nat. Bank of Amsterdam v. Miller, 163 N. Y. 164, 57 N. E. 308; Maasch v. Grauer, 58 App. Div. 560, 69 N. Y. Supp. 187; Andree v. Bourke, 33 App. Div. 638, 53 N. Y. Supp. 885; Delaware v. Ensign, 21 Barb. 85; Stoddard v. Butler, 20 Wend. 507; Osgord v. Franklin, 2 Johns. Ch. 1, 7 Am. Dec. 513.

a sale is made for considerably less than the actual value, it is such evidence of fraud as requires explanation, and may, when coupled with other facts, be controlling proof of dishonesty and fraud.³³ Great inadequacy of price is a strong badge and evidence of fraud, and in many cases will render a sale void; but it may be explained.³⁴ Gross inadequacy of price is a strong

U. S.—Hudgins v. Kemp, 20 How. 45, 15 L. Ed. 853; Bartles v. Gibson, 17 Fed. 293; Wright v. Stanard, 30 Fed. Cas. No. 18,094, 2 Brock. 311. But mere inadequacy in honest family settlements is not a badge of fraud. Voorhees v. Blanton, 83 Fed. 234.

Ala.—McCaskle v. Amarine, 12 Ala. 17; Seamans v. White, 8 Ala. 656.

Colo.—Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342.

Fla.—Barrow v. Bailey, 5 Fla. 9.

Ga.—Hawkinsville Bank, etc., Co. v. Walker, 99 Ga. 242, 25 S. E. 205.

Ill.—Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85, *aff'g* 43 Ill. App. 169; McArtee v. Engart, 13 Ill. 242.

Ind.—Hubbs v. Bancroft, 4 Ind. 388. *Compare* Milburn v. Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360; Cagney v. Cuson, 77 Ind. 494.

Iowa.—Urdangen v. Doner, 122 Iowa, 533, 98 N. W. 317; Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835, inadequacy is not material where a deed was intended as a mortgage.

Ky.—Easum v. Pirtle, 81 Ky. 561, 5 Ky. L. Rep. 572; Diamond Coal Co. v. Carter Dry Goods Co., 20 Ky. L. Rep. 1444, 49 S. W. 438.

Md.—City of Baltimore v. Williams, 6 Md. 235.

Mass.—Schaefer Brewing Co. v. Moebis, 187 Mass. 571, 73 N. E. 858.

Mo.—State v. Mason, 112 Mo. 374,

20 S. W. 629, 34 Am. Rep. 390; Robinson v. Robards, 15 Mo. 459.

N. H.—Clafin v. Batchelder, 65 N. H. 29, 17 Atl. 1060.

N. J.—Gnitchel v. Jewell (Ch. 1888), 41 Atl. 227.

Or.—Brown v. Case, 41 Or. 221, 69 Pac. 43.

Pa.—Rhoads v. Blatt, 84 Pa. St. 31.

Tex.—Moore v. Lowery, 27 Tex. 541; Mills v. Waller, Dall. Dig. 416, the inadequacy must be shown to have existed at the time of the sale.

Va.—Tebbs v. Lee, 76 Va. 744.

Wis.—Fisher v. Shelver, 53 Wis. 498, 10 N. W. 681.

Can.—Carradice v. Currie, 19 Grant Ch. (U. C.) 108; Crawford v. Meldrum, 3 Grant Err. & App. (U. C.) 101.

33. *Dodson v. Cooper*, 50 Kan. 680, 32 Pac. 370.

34. *U. S.*—Byers v. Surget, 60 U. S. 303, 15 L. Ed. 670, *aff'g* Surget v. Byers, 24 Fed. Cas. No. 13,629, Hempst. 715.

Ala.—Fairfield Packing Co. v. Kentucky Jeans Clothing Co., 110 Ala. 536, 20 So. 63; Gordon v. Tweedy, 71 Ala. 202; Bozman v. Draughan, 3 Stew. 243.

Ark.—Galbreath v. Cook, 30 Ark. 417; Beebe v. DeBaun, 8 Ark. 510.

Fla.—Gainer v. Russ, 20 Fla. 157.

Ill.—Jewett v. Cook, 81 Ill. 260; Monell v. Schenick, 54 Ill. 269; Bay v. Cook, 31 Ill. 336.

though not conclusive badge of fraud; but, coupled with other circumstances tending to prove fraud, it becomes conclusive.³⁵ Where the disparity between the true value of the property transferred and the price paid or agreed to be paid was so great as to strike the understanding with the conviction of unfair dealing or fraud, or that the transaction was not *bona fide*,³⁶ or

Ky.—Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242; Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397.

La.—Shultz v. Morgan, 27 La. Ann. 616.

Me.—Jones v. Light, 86 Me. 437, 30 Atl. 71; Wyman v. Brown, 50 Me. 139.

Mich.—Shay v. Wheeler, 69 Mich. 254, 37 N. W. 210.

Minn.—Carson v. Hawley, 28 Minn. 204, 84 N. W. 746.

Miss.—Foster v. Pugh, 20 Miss. 416; Taylor v. Eckford, 19 Miss. 21.

Mo.—State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Ames v. Gilmore, 59 Mo. 537.

N. C.—Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328.

Pa.—Hamet v. Dundass, 4 Pa. St. 178; Bossart's Estate, 11 Pa. Super. Ct. 100, the transaction is not fraudulent if the parties mistakenly believe the price is a fair one.

Tex.—Bryant v. Kelton, 1 Tex. 415.

W. Va.—Livesay v. Beard, 22 W. Va. 585.

Can.—Toronto Bank v. Irwin, 28 Grant Ch. (U. C.) 397.

Eng.—Strong v. Strong, 18 Beav. 408, 52 Eng. Reprint, 161.

35. Boyd v. Ellis, 11 Iowa, 97.

36. *N. Y.*—Morris v. Morris, 71 Hun, 45, 24 N. Y. Supp. 579.

U. S.—Jenkins v. Einstein, 13 Fed. Cas. No. 7,265, 3 Biss. 128.

Ala.—Gamble v. C. Aultman, 125 Ala. 372, 28 So. 30; Prosser v. Henderson, 11 Ala. 484; Borland v. Mayo, 8 Ala. 104; Pope v. Brandon, 2 Stew. 401, 20 Am. Dec. 49.

Ind.—Cagney v. Cuson, 77 Ind. 494.

Mich.—Noble v. Laidlaw (1904), 100 N. W. 179, 11 Det. L. N. 199.

Mo.—Wells v. Thomas, 10 Mo. 237.

Neb.—Knight v. Darby, 55 Neb. 16, 75 N. W. 48.

Ohio.—Citizens' Nat. Bank v. Wehrle, 18 Ohio Cir. Ct. 535, 9 Ohio Cir. Dec. 330; Hamill v. Wright, 8 Ohio S. & C. Pl. Dec. 467, 5 Ohio N. P. 9.

R. I.—Sweet's Petition, 20 R. I. 557, 40 Atl. 502.

Tenn.—McTeer v. Huntsman (Ch. App. 1898), 49 S. W. 57; Merriman v. Lacefield, 4 Heisk. 209.

Tex.—Numsen v. Ellis, 3 Tex. App. Civ. Cas., § 134, but the sale will not be invalidated where the purchase money has been applied to the payment of the debts.

Vt.—Church v. Chapin, 35 Vt. 223.

W. Va.—Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560; Douglass v. Douglass, 41 W. Va. 13, 23 S. E. 671, but the fact that a larger price could have been obtained, had the debtor sold on credit instead of for cash, is no ground for setting the conveyance aside.

so great as to shock the conscience or a correct mind,³⁷ it will be sufficient to avoid the sale.

§ 38. **Transactions between husband and wife; nature, adequacy, and sufficiency of consideration.**—A conveyance or transfer of property by a debtor to his wife in consideration of natural love and affection,³⁸ or for a merely nominal amount,³⁹ or for a consideration which is fictitious and fraudulent,⁴⁰ is not made on a valuable consideration sufficient to sustain it as against creditors. The general rules as to the nature, adequacy, and sufficiency of consideration for conveyances or transfers of property made by a debtor, as discussed in the preceding sections of this chapter, apply to such transactions, between husband and wife in determining the validity or invalidity thereof, as against creditors.⁴¹ An agreement by a wife to go from a city to the

Wis.—Crocker v. Huntzicker, 113 Wis. 181, 88 N. W. 232.

Wyo.—Stirling v. Wagner, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

37. McGhee v. Wells, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567; Flook v. Armentrout's Adm'r, 100 Va. 638, 42 S. E. 686; Harbottle v. Rawlins, 11 Hawaii, 105.

38. Houston v. Blackman, 66 Ala. 559, 41 Am. Rep. 756; Baker v. Hollis, 84 Iowa, 682, 51 N. W. 78; Shaw v. Manchester, 84 Iowa, 246, 50 N. W. 985; Baldwin v. Tuttle, 23 Iowa, 66; Milholland v. Tiffany, 64 Md. 455.

39. Houston v. Blackman, *supra*; Shaw v. Manchester, *supra*.

40. Smith v. Perrine, 49 Hun (N. Y.), 605, 1 N. Y. Supp. 495; Hodges v. Hickey, 67 Miss. 715, 7 So. 404; Robert v. Hodges, 16 N. J. Eq. 299.

41. *N. Y.*—Sandman v. Seaman, 84 Hun, 337, 32 N. Y. Supp. 338.

Conn.—Paulk v. Cooke, 39 Conn. 566.

Ill.—Fox v. Peck, 151 Ill. 226, 37 N. E. 873, *aff'd* 45 Ill. App. 239.

Ind.—Gable v. Columbus Cigar Co., 140 Ind. 563, 38 N. E. 474; Secor v. Souder, 95 Ind. 95; Schaef-fer v. Fithian, 17 Ind. 463.

Iowa.—Cox v. Collis, 109 Iowa, 270, 80 N. W. 343; Davis v. Garrison, 85 Iowa, 447, 52 N. W. 359.

Ky.—Ray v. Life Assoc. of America, 6 Ky. L. Rep. 514.

La.—Preslar & Tier v. Walker, 116 La. 661, 40 So. 1033.

Mich.—Otis v. Sprague, 118 Mich. 61, 76 N. W. 154.

Miss.—Wynne v. Mason, 72 Miss. 424, 18 So. 422.

N. J.—Faitoute v. Sayer (Ch. 1894), 28 Atl. 711; Aber v. Brant, 36 N. J. Eq. 116.

N. C.—Walton v. Parish, 95 N. C. 259.

Ohio.—German Nat. Bank v. Gunther, 3 Ohio S. & C. Pl. Dec. 686, 3 Ohio N. P. 311.

Pa.—Duffy v. Mechanics', etc., Ins. Co., 8 Watts & S. 413.

country, and live with her husband, is not a sufficient consideration to support a conveyance from her husband, as against creditors.⁴² Maintenance for the wife and children of the marriage is a sufficient consideration to support a settlement by a husband from whom the wife has separated because of his having lived in a state of adultery.⁴³ A conveyance by a husband to his wife of all his property, without consideration other than the purported release of the obligation of the husband thereafter to support his wife, is fraudulent as to creditors existing at the time of the making thereof.⁴⁴ A conveyance by a land owner to his wife, in order to prevent him from dissipating the property and making bad sales, is subject to any judgments which may be recovered against him on existing demands.⁴⁵ A wife has a right to purchase at a foreclosure sale against her husband, and a deed to her in pursuance of such sale and a deed from her to a third person are not fraudulent as to creditors, in the absence of actual fraud.⁴⁶ A husband when free from debt, may convey property to his wife without consideration, if the conveyance is not in contemplation of the contracting of future indebtedness and to place the same beyond the reach of his future creditors.⁴⁷

§ 39. Release of wife's dower right.—The relinquishment by a wife of her inchoate interest or right of dower in the lands

42. *Radley v. Riker*, 80 Hun (N. Y.), 353, 30 N. Y. Supp. 130.

43. *Hobbs v. Hull*, 1 Cox Ch. 445, 20 Eng. Reprint, 1242.

44. *Auburgh v. Lydston*, 117 Ill. App. 574, appeal dismissed, 216 Ill. 210, 74 N. E. 796.

45. *Tanner v. Eckhardt*, 107 App. Div. (N. Y.) 79, 94 N. Y. Supp. 1013.

46. *Hesseltine v. Hodges*, 188 Mass. 247, 74 N. E. 319.

47. *Clark v. Else* (S. D. 1906), 110 N. W. 88.

When conveyance not voluntary.—Where a wife, having commenced divorce proceedings against

her husband and obtained an injunction against his disposing of his property, enters into a contract with him whereby he agrees to cease drinking and to properly support her, and to execute to her a deed to be placed in escrow, to be delivered to her on his breaking his agreement, she agreeing to continue her suit and live with him, such deed is not voluntary to any extent, as regards the question of fraudulent conveyance, though the property conveyed was worth more than she could have recovered as alimony. *Pippin v. Tapia* (Ala. 1906), 42 So. 545.

of her husband is a valuable and sufficient consideration to support a conveyance or transfer by him, or procured by him, to her, of a part of his lands or other property, or for a settlement on her from the husband's property, and such a conveyance is valid as against creditors of the husband.⁴⁸ Although the value

48. *U. S.*—*Mattoon v. McGrew*, 112 U. S. 713, 5 Sup. Ct. 369, 28 L. Ed. 824; *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577.

Ala.—*Keel v. Larkin*, 83 Ala. 142, 3 So. 296, 3 Am. St. Rep. 702; *Gordon v. Tweedy*, 71 Ala. 202.

Ark.—*Davis v. Yonge* (1905), 85 S. W. 90; *Hershby v. Latham*, 46 Ark. 542.

Fla.—*Pettit v. Coachman* (1906), 41 So. 401; *Nalle v. Lively*, 15 Fla. 130.

Ill.—*Payne v. Miller*, 103 Ill. 442. But see *McCaffrey v. Dustin*, 43 Ill. App. 34.

Ind.—*Baldwin v. Heil*, 155 Ind. 682, 58 N. E. 200; *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Sedgwick v. Tucker*, 90 Ind. 271; *Brown v. Rawlings*, 72 Ind. 505; *Holwell v. Simonson*, 21 Ind. 398.

Ky.—*Potter v. Skiles*, 114 Ky. 132, 70 S. W. 301, 71 S. W. 627, 24 Ky. L. Rep. 910, 1457; *Harrow v. Johnson*, 60 Ky. 578; *Marshall v. Hutchison*, 44 Ky. 298; *Darling v. Haanks* (1897), 42 S. W. 1130; *Jones v. Basham* (1891), 16 S. W. 88; *Green v. Green*, 4 Ky. L. Rep. 250.

Md.—*Unger v. Price*, 9 Md. 552.

Mass.—*Mathews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 104 Am. St. Rep. 550, 66 L. R. A. 421; *Holmes v. Winchester*, 133 Mass. 140; *Bullard v. Briggs*, 24 Mass. 533, 19 Am. Dec. 292.

Mich. — *German-American Semi-*

nary v. Saenger, 66 Mich. 249, 33 N. W. 301.

Neb.—*Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877.

N. H.—*Rundlett v. Ladd*, 59 N. H. 15.

Ohio.—*Singree v. Welch*, 32 Ohio St. 320; *Williams v. Williams*, 2 Ohio Dec. 467, 3 West. L. Month. 157.

Va.—*Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279; *Ficklin's Adm'r v. Rixey*, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; *Strayer v. Long*, 86 Va. 557, 10 S. E. 574; *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *Burwell's Ex'r v. Lumsden*, 24 Gratt. 443, 18 Am. Rep. 648; *Taylor v. Moore*, 2 Rand. 563; *Lewis v. Caperton*, 8 Gratt. 148; *Harrison v. Carroll*, 11 Leigh, 476; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Blanton v. Taylor*, Gilm. 209; *Quarles v. Lacy*, 4 Munf. 251.

W. Va.—*Glascock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

Eng.—*Mills v. Eden*, 10 Mod. 487. *Compare* *In re Conlan*, L. R. 29, Ir. 199.

Can.—*Morris v. Martin*, 19 Ont. 564; *Beavis v. Maguire*, 7 Ont. App. 704; *Forrest v. Laycock*, 18 Grant Ch. (U. C.) 611; *Patulo v. Boyington*, 4 U. C. C. P. 125.

Contra.—*Sharff v. Hayes* (1906), 110 N. W. 24; *Haynes v. Kline*, 64 Iowa, 308, 20 N. W. 453; *Le Saulnier v. Krueger*, 85 Wis. 214, 54 N. W. 774.

of the wife's right of dower is much less than the value of land conveyed or property transferred to her, yet such conveyance or transfer is not absolutely void, but in a court of law must be adjudged valid.⁴⁹ In equity, however, such a conveyance or transfer will be considered as valid only to the extent of the value of the dower right released by the wife.⁵⁰ Where the value of the dower right relinquished is too inadequate a consideration to support the conveyance as against creditors, it will render the conveyance constructively fraudulent and invalid as to creditors.⁵¹ The foregoing rules are applicable both where the release of dower was made at the same time as the conveyance or transfer,⁵² and where it was made in pursuance of an agreement preceding the conveyance or transfer.⁵³ A conveyance in consideration of a previous assignment of the right of dower would be voluntary as to existing creditors.⁵⁴ A mere joinder by the wife for the purpose of conveying her inchoate interest, in a fraudulent conveyance of real property by the husband, through a trustee, to himself and his wife, to hold by entireties, does not form such a consideration as will support the conveyance.⁵⁵ Nor is the joinder of the grantor's wife in the conveyance of property encumbered to its full value a sufficient

49. *Smith v. Seiberling*, 35 Fed. 677; *Wright v. Stanard*, 30 Fed. Cas. No. 18,094, 2 Brock. 311; *Hoot v. Sorrell*, 11 Ala. 386; *Peaslee v. Collier*, 83 Mich. 549, 47 N. W. 353.

50. N. Y.—*Smart v. Haring*, 14 Hun, 276, *modifying* 52 How. Pr. 505.

U. S.—*Wright v. Stanard*, *supra*.

Ky.—*Ward v. Crotty*, 61 Ky. 59; *Darling v. Hanks* (1897), 42 S. W. 1130.

Neb.—*Adler, etc., Clothing Co. v. Hellman*, *supra*.

Va.—*Johnston v. Gill*, 27 Gratt. 587; *Davis v. Davis*, 25 Gratt. 587; *Taylor v. Moore*, 2 Rand. 563; *Blanton v. Taylor*, Gilm. 209.

51. *Gordon v. Tweedy*, 71 Ala. 202; *Garvey v. Moore*, 12 Ky. L. Rep. 732, 15 S. W. 136; *Clinton Bank v. Cummins*, 38 N. J. Eq. 191; *Black v. Fountain*, 23 Grant Ch. (U. C.) 174.

52. *Gordon v. Tweedy*, 71 Ala. 202.

53. *United States Bank v. Lee*, 13 Pet. (U. S.) 107, 10 L. Ed. 81, *aff'g* 2 Fed. Cas. No. 922, 5 Cranch C. C. 319; *Gordon v. Tweedy*, 71 Ala. 202; *Payne v. Hutcheson*, 32 Gratt. (Va.) 812. *Compare* *Harrison v. Carroll*, 11 Leigh (Va.), 476.

54. *Woodson v. Pool*, 19 Mo. 340.

55. *Phillips v. Kennedy*, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

consideration, as against creditors, for the conveyance of other property by him to her.⁵⁶

§ 40. **Release of homestead right.**—The relinquishment of homestead rights by a wife, like the release of dower rights, is a sufficient consideration to support a conveyance or transfer of property to her by her husband, or a reasonable settlement upon her out of the proceeds of the sale of the property, as against the husband's creditors, although the husband was in failing circumstances or insolvent.⁵⁷

§ 41. **Property vested in husband by marriage.**—The fact that by virtue of the marriage a husband acquired property of his wife is not sufficient to support, as against creditors, a conveyance to her or for her use made by the husband. Such a conveyance must be considered as a voluntary conveyance.⁵⁸ But

56. Commonwealth Title Ins., etc., Co. v. Brown, 166 Pa. St. 477, 31 Atl. 205, 36 Wkly. N. Cas. 190.

57. Ark.—Davis v. Yonge (1905), 85 S. W. 90.

Ill.—Payne v. Miller, 103 Ill. 442, such a conveyance will be sustained to the extent of the consideration.

Mich.—Sullivan v. Parkinson, 128 Mich. 527, 87 N. W. 639, where the wife's claim for money invested in the property and her homestead interest exceeded the value of the property conveyed to her, no part of the property was subject to the husband's debts.

Mo.—Novelty Mfg. Co. v. Pratt, 21 Mo. App. 171, the conveyance is good in law for the whole property conveyed, and in equity to the value of the wife's interest in the homestead.

Tex.—Burnham v. McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887.

Wis.—Allen v. Perry, 56 Wis. 178, 14 N. W. 3.

The use of proceeds of a mortgage on a homestead standing in the wife's name, in paying for a machine purchased by the husband, constitutes a sufficient consideration, as against creditors, for a bill of sale executed by the husband transferring the machine to his wife. Farmers' Trust Co. v. Linn, 103 Iowa, 159, 72 N. W. 496.

58. U. S.—Lee v. Hollister, 5 Fed. 752.

Ala.—Jaffrey v. McGough, 83 Ala. 202, 3 So. 594. But see Bradford v. Goldsborough, 15 Ala. 311, holding that a deed by a husband to his wife of all his interest in her distributive share of the estate of her deceased father may be enforced in equity against an execution creditor of the husband, who brought suit to subject the property to the satisfaction of his debt after the wife had taken possession.

Ill.—Bridgford v. Riddell, 55 Ill. 261.

such a conveyance is valid if the husband was solvent at the time, and it was not made with intent to defraud subsequent creditors.⁵⁹

§ 42. Effect of failure to reduce property to possession.—Where the husband does not assert his marital rights to the personal property of his wife by reducing it into his possession, but borrows money from her agreeing to repay it, the agreement is for a good consideration, and inposes an equitable obligation upon the husband to repay it.⁶⁰ Lands purchased by the wife or for her use with funds belonging to her which have not been reduced to possession by the husband, cannot be subjected to the payment of the husband's debts so as to defeat the equity of the wife.⁶¹

Ky.—Anderson v. Anderson, 80 Ky. 632; Hurdt v. Courtenay, 61 Ky. 139; Lyne v. Bank of Kentucky, 28 Ky. 545; Darling v. Hanks, 21 Ky. L. Rep. 145, 147, 42 S. W. 1130, 51 S. W. 792; Tapp v. Todd, 16 Ky. L. Rep. 382, 28 S. W. 147; Davis Ex'rs v. Justice, 14 Ky. L. Rep. 741, 21 S. W. 529; Garvey v. Moore, 12 Ky. L. Rep. 732, 15 S. W. 136.

Md.—Wylie v. Basil, 4 Md. Ch. 327.

Mass.—Pierce v. Thompson, 34 Mass. 391.

Mo.—Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958; Columbia Sav. Bank v. Winn, 132 Mo. 80, 33 S. W. 457; Hart v. Leete, 104 Mo. 315, 15 S. W. 976; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 80.

N. J.—Taylor v. Dawes (Ch. 1888), 13 Atl. 593; Smock v. Jones (Ch. 1887), 11 Atl. 497.

N. C.—Allen v. Allen, 41 N. C. 293.

Pa.—Gicker's Adm'rs v. Martin, 50 Pa. St. 138.

S. C.—Suber v. Chandler, 36 S. C. 344, 15 S. E. 426; Irby v. Henry, 16

S. C. 617; Sibley v. Tutt, 1 McMul. Eq. 320.

Tenn.—Joiner v. Franklin, 80 Tenn. 420.

Vt.—Warren v. Ranney, 50 Vt. 653.

Va.—Rixey's Adm'r v. Detrick, 85 Va. 42, 6 S. E. 615; Poindexter v. Jeffries, 15 Grat. 363; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519.

W. Va.—Clarke v. King, 34 W. Va. 631, 12 S. E. 775.

Wis.—Howe v. Colby, 19 Wis. 583.

Contra.—Comer v. Allen, 72 Ga. 1; Sperry v. Haslam, 57 Ga. 412, property of the wife, reduced to his possession for his wife, and as her estate, affords a good and sufficient consideration for a conveyance by the husband to the wife.

59. Dick v. Hamilton, Fed. Cas. No. 3,890, Deady, 322.

60. Jaycox v. Caldwell, 51 N. Y. 395, *aff'g* 37 How. Pr. (N. Y.) 240; Woodworth v. Sweet, 51 N. Y. 8, *aff'g* 44 Barb. (N. Y.) 268; Drury v. Briscoe, 42 Md. 154.

61. Bank of United States v. Brown, Rilev Eq. (S. C.) 131, 2 Hill

§ 43. **Earnings, services, and savings of wife.**—Where the common law rule still prevails that the wife's earnings belong to the husband and he cannot give them to her to the prejudice of existing creditors, such earnings are not a sufficient consideration for a conveyance or transfer by the husband, or through a third person, to the wife, and such a conveyance or transfer is fraudulent as to existing creditors of the husband, but is valid as to subsequent creditors unless tainted with a fraudulent intent.⁶² The rule stated applies although a promise had been previously made by the husband that the wife should be entitled to the proceeds of her labor to her own use.⁶³ But where the earnings of a wife are her separate property and estate, in accordance with constitutional or statutory provisions, they are sufficient consideration for such conveyances or transfers.⁶⁴ Neither the services of a wife to her husband,⁶⁵ or to a member of his household,⁶⁶ nor savings from money given to her by him,⁶⁷ are a sufficient consideration to sustain a conveyance by the

Eq. (S. C.) 558, 30 Am. Dec. 380; *Cox v. Scott*, 68 Tenn. 305.

62. *U. S.*—*Union Trust Co. v. Fischer*, 25 Fed. 178.

Ala.—*Glaze v. Blake*, 56 Ala. 379; *McLemore v. Nuckolls*, 37 Ala. 662; *Pinkston v. McLemore*, 31 Ala. 308.

Conn.—*Hinman v. Parkis*, 33 Conn. 188.

Ind.—*Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798.

S. C.—*McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480.

Va.—*Campbell v. Bowles' Adm'r*, 30 Gratt. 652.

63. *McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480. But see *Bartlett v. Behrens*, 94 Mo. 530, 7 S. W. 581; *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484.

64. *Hedge v. Glenny*, 75 Iowa, 513, 39 N. W. 818, 1 L. R. A. 479; *Falkenburg v. Johnson*, 102 Ky. 543, 44 S.

W. 80, 19 Ky. L. Rep. 1606, 80 Am. St. Rep. 369; *Draper v. Buggee*, 133 Mass. 258. See also chap. IV, § 8, *supra*.

65. *Lee v. Savannah Guano Co.*, 99 Ga. 572, 27 S. E. 159, 59 Am. St. Rep. 243; *Dumas v. Neal*, 51 Ga. 563; *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798; *McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480; *Farmers' Nat. Bank v. Thomson*, 74 Vt. 442, 52 Atl. 961.

66. *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160, *aff'd* 25 Hun (N. Y.), 239.

67. *Petingale v. Barker*, 21 D. C. 156; *Wisconsin Granite Co. v. Ray*, 144 Ill. 77, 33 N. E. 31, *rev'd* 44 Ill. App. 240, money given for housekeeping purposes. But see *Smyth v. Reber* (N. J. Ch. 1889), 18 Atl. 462; *Carpenter v. Franklin*, 89 Tenn. 142, 14 S. W. 484.

husband to the wife, as against his creditors. A contract between a husband and wife, by which the latter is to be paid for her services rendered in the household, is void as against creditors of the husband; and, if his estate is transferred to the wife in a payment of such services and in performance of such a contract, the transfer is void as against the creditors of the husband, and the property so transferred or purchased with the avails of such a contract may be reached by his creditors.⁶⁸

§ 44. Consideration paid by husband for property purchased in name of wife.—Where a husband purchases property with his own funds, taking the title in the name of his wife, the conveyance or transfer to her is without consideration, and is fraudulent and void as against his existing creditors.⁶⁹ Where prop-

68. *Conger v. Corey*, 39 App. Div. (N. Y.) 241, 57 N. Y. Supp. 236, citing *In re Callister*, 153 N. Y. 294, 47 N. E. 268; *Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122; *Blaechinska v. Howard Mission*, 130 N. Y. 497, 29 N. E. 755; *Coleman v. Burr*, 93 N. Y. 17; *Talcott v. Thomas*, 21 N. Y. Supp. 1064.

69. *N. Y.*—*Stokes v. Ammerman*, 55 Hun, 605, 7 N. Y. Supp. 733; *Tappan v. Butler*, 20 N. Y. Super. Ct. 480, but it is not necessarily fraudulent and void as to subsequent creditors.

Ala.—*Stoutz v. Huger*, 107 Ala. 248, 18 So. 126; *Peevey v. Cabaniss*, 70 Ala. 253.

Ark.—*Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707; *Baldwin v. Johnston*, 8 Ark. 260.

Colo.—*Phillips v. Rhodes*, 2 Colo. App. 70, 29 Pac. 1011.

Conn.—*Trumbull v. Hewitt*, 62 Conn. 448, 26 Atl. 350.

D. C.—*Thyson v. Foley*, 1 App. D. C. 182.

Fla.—*Reel v. Livingston*, 34 Fla. 377, 16 So. 284, 43 Am. St. Rep. 202; *Alston v. Rowles*, 13 Fla. 117; *Craig v. Gamble*, 5 Fla. 430.

Ill.—*Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486, *aff'g* 36 Ill. App. 115; *New v. Oldfield*, 110 Ill. 138; *Pratt v. Myers*, 56 Ill. 23. Compare *Canon v. Castleman*, 164 Ind. 343, 73 N. E. 689.

Ind.—*Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7; *Wilds v. Bogan*, 55 Ind. 331; *Mendenhall v. Treadway*, 44 Ind. 131.

Iowa.—*Peckenhaugh v. Cook*, 61 Iowa, 477, 16 N. W. 530; *Gear v. Schrei*, 57 Iowa, 666, 11 N. W. 625. See also *Van Hoesen v. Teachout*, 88 Iowa, 458, 55 N. W. 486.

Ky.—*Dickinson v. Johnson*, 110 Ky. 236, 61 S. W. 267, 22 Ky. L. Rep. 1686, 96 Am. St. Rep. 434, 54 L. R. A. 566; *Adams v. O'Rear*, 80 Ky. 129,

erty is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the presumption is that her husband furnished the means to pay for it, and the burden is on her to prove affirmatively that it was paid for with her own separate estate.⁷⁰ Property conveyed to a wife, but paid for by the husband, is *prima facie* a gift by him to her; and, where it does not appear that he was indebted at the time, or intended to defraud his subsequent creditors, the proceeds of such gift belong to her, free from claims by him or his creditors.⁷¹ In the absence of fraud, such a conveyance is valid against all but the existing creditors of the husband.⁷² But where an actual fraudulent intent is shown, the conveyance is

3 Ky. L. Rep. 605; *Hearn v. Lander*, 74 Ky. 669; *Fink v. Nolan*, 21 Ky. L. Rep. 1305, 54 S. W. 948; *Straus v. Head*, 14 Ky. L. Rep. 740, 21 S. W. 537; *McBride v. McLaughlin*, 5 Ky. L. Rep. 174; *Yates v. Fisher*, 4 Ky. L. Rep. 721. Compare *McChord v. Noe*, 8 Ky. L. Rep. 344, 1 S. W. 644. *Me.*—*Berry v. Berry*, 84 Me. 541, 24 Atl. 957; *Call v. Perkins*, 65 Me. 439.

Miss.—*Bernheim v. Beer*, 56 Miss. 149.

Mo.—*Osborne v. Evans*, 185 Mo. 509, 84 S. W. 867; *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378; *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559; *Reppy v. Reppy*, 46 Mo. 571.

N. C.—*Markham v. Whitehurst*, 109 N. C. 307, 13 S. E. 904, *distinguishing* *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

Ohio.—*Parish v. Rhodes, Wright*, 339.

Pa.—See *Bucher v. Ream*, 68 Pa. St. 421.

S. D.—*Watt v. Morrow* (1905), 103 N. W. 45.

Va.—*Quarles v. Lacy*, 4 Munf. 251.

W. Va.—*Rose v. Brown*, 11 W. Va. 122.

Wis.—*Hoxie v. Price*, 31 Wis. 82. See also Purchase of property in name of third person—Husband and wife, chap. II, § 6, *supra*.

70. *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486, *aff'g* 36 Ill. App. 115; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *McMasters v. Edgar*, 22 W. Va. 673. See also Purchase of property in name of third person—Husband and wife, chap. II, § 6, *supra*.

In Minnesota, the statute imputes a fraudulent intent to a debtor who pays the purchase money of lands granted to his wife, and, therefore, a finding that there is no evidence of fraudulent intent, and that the debtor was solvent, cannot defeat the creditor's right to subject the land to his debt. *Wolford v. Farnham*, 42 Minn. 159, 46 N. W. 295; *Mathews v. Torinus*, 22 Minn. 132.

71. *Pitkin v. Mott*, 56 Mo. App. 401.

72. *Irvine v. Greever*, 27 W. Va. 206.

fraudulent and void as to subsequent, as well as existing, creditors of the husband.⁷³

§ 45. **Assumption of husband's debts.**—The assumption by a wife of the debts of her husband is a valid consideration, as against his creditors, for a conveyance by him to her, at least to the amount of the debts assumed.⁷⁴ But a conveyance from a husband of all his property to his wife, in consideration of her assuming certain preferred debts, the property being worth more than the debts secured, is void as against unsecured creditors.⁷⁵ And the fact that the wife, on receipt of a deed from her husband, promises to pay all his debts, does not preclude a finding that it is in fraud of his creditors, since it may have been intended to give her an advantage as to the time of payment.⁷⁶

§ 46. **Payment of pre-existing debts in general.**—Where a husband, in good faith, transfers property to his wife, in payment of, or as security for, a *bona fide* debt due by him to her, the consideration is a valuable one and the transfer or conveyance is valid, as against other existing creditors.⁷⁷ The rule is

73. *Marshall v. Whitney*, 43 Fed. 343; *Holmes v. Harshberger*, 31 W. Va. 516, 7 S. E. 452; *Core v. Cunningham*, 27 W. Va. 206.

74. *Ind.*—*Huffman v. Copeland*, 86 Ind. 224.

Neb.—*Farmers' & Merchants' Irr. Co. v. Brumbaugh* (1906), 110 N. W. 663.

S. C.—*Ferguson v. Harrison*, 41 S. C. 340, 19 S. E. 619; *McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480, although the note given by the wife in satisfaction of the husband's debts is not paid, and part of the debts were barred by limitation when she gave the note.

Va.—*Barton v. Brent*, 87 Va. 385 15 Va. L. J. 257, 13 S. E. 29.

W. Va.—*Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560.

See also Assumption of liability, chap. VIII, § 14, *supra*.

75. *Park v. Battey*, 80 Ga. 353, 5 S. E. 492.

76. *Threlkel v. Scott* (Cal. 1893), 34 Pac. 851.

77. *N. Y.*—*Lassiter v. Hoes*, 11 Misc. Rep. 1, 31 N. Y. Supp. 850; *Ocean Nat. Bank v. Hodges*, 9 Hun, 161; *Schaffner v. Reuter*, 37 Barb. 44; *Flannigan v. Barter*, 12 St. Rep. (N. Y.) 554. Compare *Blumenthal v. Michel*, 33 App. Div. 636, 54 N. Y. Supp. 81.

U. S.—*Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; *Bean v. Patterson*, 12 Fed. 739,

the same if, with fraud on the part of the husband, but without knowledge thereof or participation therein by the wife, he

4 McCrary, 179; Lee v. Hollister, 5 Fed. 752.

Ala.—First Nat. Bank v. Smith, 93 Ala. 97, 9 So. 548; Lyne v. Wann, 72 Ala. 43; Warren v. Jones, 68 Ala. 449; Barclay v. Plant, 50 Ala. 509. *Compare* Robinson v. Moseley, 93 Ala. 70, 9 So. 372.

Cal.—Greenwalt v. Mueller, 126 Cal. 636, 59 Pac. 137.

Del.—Jones v. Cannon, 8 Houst. 1, 31 Atl. 521; Hood v. Jones, 5 Del. Ch. 77.

Ga.—Booher v. Worrill, 57 Ga. 235.

Ill.—Thomas v. Mueller, 106 Ill. 36; Dean v. Plane, 96 Ill. App. 428, *aff'd* 195 Ill. 495, 63 N. E. 274.

Ind.—Jones v. Snyder, 117 Ind. 229, 20 N. E. 140; Cornell v. Gibson, 114 Ind. 144, 16 N. E. 130, 5 Am. St. Rep. 605; Schreeder v. Werry (App. 1905), 73 N. E. 832. *Compare* Bunch v. Hart, 138 Ind. 1, 37 N. E. 537.

Iowa.—Meyer v. Houck, 85 Iowa, 319, 52 N. W. 235; Neighbor v. Hoblitcel, 84 Iowa, 598, 51 N. W. 53; Peck v. Lincoln, 76 Iowa, 424, 41 N. W. 61; McFarland v. Elliott, 71 Iowa, 755, 36 N. W. 418; Jones v. Brandt, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310.

Ky.—Noel v. Gaines, 23 Ky. L. Rep. 2093, 66 S. W. 625. *Compare* Clay v. Trimble, 13 Ky. L. Rep. 61, 16 S. W. 83.

Mich.—Ullman v. Thomas, 126 Mich. 61, 85 N. W. 245; Parker v. Barkenowitz, 116 Mich. 58, 74 N. W. 290; Strauss v. Parshall, 91 Mich. 475, 51 N. W. 1117; Meigs v. Dibble, 73 Mich. 101, 40 N. W. 935; Hyde v. Powell, 47 Mich. 156, 10 N. W. 181;

First Nat. Bank v. McAllister, 46 Mich. 397, 9 N. W. 446.

Miss.—Graham v. Morgan, 83 Miss. 601, 35 So. 874; Rogers v. Mayer, 59 Miss. 524.

Mo.—Hart v. Leete, 104 Mo. 315, 15 S. W. 976.

N. J.—Knickerbocker Trust Co. v. Carhart (Ch. 1906), 64 Atl. 756; Berla v. Meisel (Ch. 1902), 52 Atl. 999; Dresser v. Zabriskie (Ch. 1898), 39 Atl. 1066; Rue v. Scott (Ch. 1891), 21 Atl. 1048; Cole v. Lee, 45 N. J. Eq. 779, 18 Atl. 854; Hagerman v. Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652.

Ohio.—Hitesman v. Donnel, 40 Ohio St. 287.

Pa.—Rine v. Hall, 187 Pa. St. 264, 40 Atl. 1088; Grabill v. Moyer, 45 Pa. St. 530.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; McGee v. Wells, 52 S. C. 472, 30 S. E. 602; Gerald v. Gerald, 28 S. C. 442, 6 S. E. 290.

Tenn.—Rosenbaum v. Davis (Ch. App. 1898), 48 S. W. 706; Blackmore v. Crutcher (Ch. App. 1898), 46 S. W. 310; Sanford v. Allen (Ch. App. 1897), 42 S. W. 183.

Tex.—Cooper v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; Bonds v. Eagle, etc., Mfg. Co. (Civ. App. 1898), 44 S. W. 539.

Vt.—Drew v. Corliss, 65 Vt. 650, 27 Atl. 613.

Va.—Robinson v. Bass, 100 Va. 190, 40 S. E. 660; McConville v. National Valley Bank, 98 Va. 9, 34 S. E. 891; Spence v. Repass (1897),

makes such transfer.⁷⁸ A husband indebted to his wife is entitled to prefer her to his other creditors.⁷⁹ Claims against the husband purchased by the wife with her separate estate are sufficient consideration for a conveyance from him to her.⁸⁰ An advancement of money by a wife to her husband, without any agreement for repayment, or money given by a wife to her husband to be employed in his business, or money of the wife which the husband has collected and used with her knowledge and consent, and without any promise of repayment, or money advanced under any other circumstances not sufficient in law to create the relation of debtor and creditor between them, is not a valid consideration for a subsequent conveyance or transfer of property by the husband to the wife, as against his creditors.⁸¹

27 S. E. 583. *Compare* *Perry v. Ruby*, 81 Va. 317.

Compare *Stockslager v. Mechanics' Loan, etc., Inst.*, 87 Md. 232, 39 Atl. 742; *Hoagland v. Wilson*, 15 Neb. 320, 18 N. W. 78.

If the consideration be inadequate for a conveyance of property by a husband to his wife in payment of an indebtedness to her, it will be construed as a mortgage. *German Nat. Bank v. Gunther*, 3 Ohio S. & C. Pl. Dec. 686, 3 Ohio N. P. 311.

78. *Riley v. Vaughn*, 116 Mo. 169, 22 S. W. 707, 38 Am. St. Rep. 586; *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753. See also Effect of want of knowledge or notice of grantee, chap. XIII, § 4, *supra*.

79. *Schreder v. Werry* (Ind. App. 1905), 73 N. E. 832.

80. *Strong v. Skinner*, 4 Barb. (N. Y.), 546; *Wingerd v. Fallon*, 95 Pa. 184.

The fact that a wife destroyed a note given her by her father, which had been given him by her husband for money advanced him by her

father to pay for certain lands, does not create such an indebtedness from her husband to her as to justify his conveying the land to her, as against his creditors. *Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

81. N. Y.—*Clift v. Moses*, 75 Hun, 517, 27 N. Y. Supp. 728.

Ark.—*Waters v. Merrit Pants Co.* (1905), 88 S. W. 879; *Reeves v. Slade*, 71 Ark. 611, 77 S. W. 54.

Ill.—*Victor v. Swisky*, 200 Ill. 257, 65 N. E. 625, *rev'g* 87 Ill. App. 583; *Coale v. Moline Plow Co.*, 134 Ill. 350, 25 N. E. 1016.

Ind.—*Hoffman v. Henderson*, 145 Ind. 613, 44 N. E. 629.

Iowa.—*Woods v. Allen*, 109 Iowa, 484, 80 N. W. 540; *Dunham v. Bentley*, 103 Iowa, 136, 72 N. W. 437; *Iseminger v. Criswell*, 98 Iowa, 382, 67 N. W. 289; *Carbiener v. Montgomery*, 97 Iowa, 659, 66 N. W. 900; *Tyler v. Budd*, 96 Iowa, 29, 64 N. W. 679; *Peninsular Stove Co. v. Roark*, 94 Iowa, 560, 63 N. W. 326; *Porter v. Goble*, 88 Iowa, 565, 55 N. W. 530; *Hanson v. Mauley*, 72 Iowa, 48, 33 N.

Though the law will not imply the relation of debtor and creditor between husband and wife from the mere transfer of her separate property to him, such relation may nevertheless be established, as against other creditors of the husband, by evidence that such was the intention of the parties at the time of the transfer.⁸² To establish the relation of debtor and creditor between husband and wife an express promise to repay need not be shown, but where the wife advances money to her husband and the circumstances attending the receipt of the money are such as to show that they dealt with each other as debtor and creditor, a conveyance or transfer to her to pay or secure the indebtedness is valid as against creditors.⁸³ The general rules as to a pre-existing debt

W. 357; *Moore v. Orman*, 56 Iowa, 39, 8 N. W. 699.

Kan.—*Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756.

Md.—*Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453; *Grover, etc., Sewing Mach. Co. v. Radcliff*, 63 Md. 496; *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681.

Mich.—*Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W. 369, 69 Am. St. Rep. 562.

Neb.—*Wake v. Griffin*, 9 Neb. 47, 2 N. W. 461.

N. J.—*Cole v. Lee*, 45 N. J. Eq. 779, 18 Atl. 854; *Luers v. Brunjes*, 34 N. J. Eq. 19, 561; *Post v. Stiger*, 29 N. J. Eq. 554, a claim by a wife against her husband, first put in writing when his liabilities began to jeopardize, will be regarded with suspicion and rejected, unless clearly proved, when attempted to be enforced as against the husband's creditors.

N. M.—*First Nat. Bank v. McClellan*, 9 N. M. 636, 58 Pac. 347.

Pa.—*Grabill v. Moyer*, 45 Pa. St. 530.

Va.—*New South Bldg, etc., Assoc.*

v. Reed, 96 Va. 345, 31 S. E. 514, 7 Am. St. Rep. 858; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1.

W. Va.—*Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; *Maxwell v. Hanshaw*, 24 W. Va. 405; *McGinnis v. Curry*, 13 W. Va. 29.

Wis.—*Le Saulner v. Krueger*, 85 Wis. 214, 54 N. W. 774.

Promise of repayment not implied.—Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and in order to constitute such delivery a loan, as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift. *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; *Grover, etc., Sewing Mach. Co. v. Radcliff*, 63 Md. 496.

82. *Willis v. Willis*, 79 App. Div. (N. Y.) 9, 79 N. Y. Supp. 1028.

83. *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756; *Sykes v. City Sav. Bank*, 115 Mich. 321, 73 N. W.

as consideration for a conveyance are applicable to transactions between husband and wife.⁸⁴

§ 47. **Repayment of money loaned by wife.**—A conveyance by the husband to his wife, in consideration of money loaned by the wife to him out of her separate estate, and not made to hinder, delay, and defraud his creditors, the amount of which bears a reasonable proportion to the property conveyed, is valid as against the creditors of the husband.⁸⁵ But where the loan was used for the benefit of the wife's separate estate, a subsequent transfer of property by the husband in trust for the wife's benefit is without consideration.⁸⁶ A judgment honestly con-

369, 69 Am. St. Rep. 562; Steadman v. Wilbur, 7 R. I. 481.

84. See cases cited in note 77; and Pre-existing debt, chap. VIII, § 18, *supra*.

85. N. Y.—Savage v. O'Neil, 44 N. Y. 298, *rev'g* 42 Barb. 374; Brooklyn v. Lamon, 56 Hun, 647, 9 N. Y. Supp. 849, although the loan was made prior to the passage of the married woman's acts, the wife had an equitable right to its repayment sufficient to support a conveyance for the purpose, which would not be defeated by mere lapse of time.

U. S.—Vansickle v. Wells, 105 Fed. 16.

Ga.—Robinson v. Stevens, 93 Ga. 535, 21 S. E. 96, and it is not rendered fraudulent by the fact that the wife failed to disclose to her husband's creditors that she had loaned him money, no inquiry having been made.

Ill.—McQuown v. Law, 18 Ill. App. 34.

Ind.—Fulp v. Beaver, 136 Ind. 319, 36 N. E. 250; Dillen v. Johnson, 132 Ind. 75, 30 N. E. 786; Hogan v. Rob-

inson, 94 Ind. 138; Kyger v. F. Hull Skirt Co., 34 Ind. 249.

Iowa.—Mahaska County v. Whitsel (1907), 110 N. W. 614; Muir v. Miller, 103 Iowa, 127, 72 N. W. 409; Citizens' Nat. Bank v. Webster, 76 Iowa, 281, 41 N. W. 47; Rockford Boot, etc., Mfg. Co. v. Mastin, 75 Iowa, 112, 39 N. W. 219. See also Payne v. Wilson, 76 Iowa, 377, 41 N. W. 45.

Kan.—Monroe v. May, 9 Kan. 466.

Ky.—Latimer v. Glenn, 65 Ky. 535. See Ahlering's Ex'r v. Speckman (1907), 99 S. W. 973.

Me.—Randall v. Lunt, 51 Me. 246.

Mass.—Atlantic Nat. Bank v. Taver-
ner, 130 Mass. 407.

Neb.—Weis v. Farley (1907), 110 N. W. 656; Lipscomb v. Lyon, 9 Neb. 511, 27 N. W. 731.

Pa.—In re Jamison, 183 Pa. St. 219, 38 Atl. 604; Mancil v. Mancil, 2 Del. Co. R. 531.

Tex.—Shryock v. Latimer, 57 Tex. 674.

W. Va.—First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554.

86. Grevils v. Smith, 29 Tex. Civ. App. 150, 68 S. W. 291.

fessed by an insolvent man in favor of his wife, to secure her for money loaned to him by her out of her separate estate, is not fraudulent as against creditors, merely because it includes interest on the loan, when there was in fact no agreement that the sum loaned should bear interest.⁸⁷

§ 48. **Appropriation of wife's separate estate.**—A *bona fide* conveyance or transfer of property by a husband to his wife, or for her benefit, in payment of or as security for a debt arising out of the husband's appropriation and conversion of his wife's separate estate to his own use, is valid as against the husband's creditors, though he was insolvent at the time of the execution of the conveyance.⁸⁸ A bill of sale, executed by the husband to secure his wife a sum of money belonging to her in her own right, but received by him and invested in his business with her knowledge and acquiescence, is void as to prior creditors, where there was no agreement by the husband to repay the money, and the creditors are without other security for their demands.⁸⁹

§ 49. **Rents and profits of wife's separate estate.**—Where, by direction of a wife, the rents of her separate estate are paid to her husband with the understanding that he will invest them for her benefit, this creates a debt sufficient to constitute a valid consideration for a subsequent deed from him to her.⁹⁰ But where, under a statute, the husband, as trustee of the statutory separate

87. *Hawley v. Griffith*, 187 Pa. St. 306, 41 Atl. 30; *Appeal of Meekley*, 102 Pa. St. 536.

88. *Ala.*—*Vincent v. State*, 74 Ala. 274; *Northington v. Faber*, 52 Ala. 45; *Rowland v. Plummer*, 50 Ala. 182.

Ind.—*Lenard v. Barnett*, 70 Ind. 367; *Thompson v. Mills*, 39 Ind. 528.

Iowa.—*Dunham v. Bentley*, 103 Iowa, 136, 72 N. W. 437.

S. C.—*Taylor v. Heriot's Ex'r*, 4 Desaus. 227.

Tex.—*McKamey v. Thorp*, 61 Tex. 648. But see *Allen v. Merriwether* (Ky.), 9 S. W. 807. See also Conveyances by husband to or for wife, chap. IV, § 33, *supra*.

89. *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681.

90. *Tarsney v. Turner*, 48 Fed. 818. See Conveyance by husband to or for wife, chap. IV, § 33, *supra*.

estate of his wife, has the right to control it, without liability to account to the wife for the rents, income, and profits, a conveyance of property by him to his wife, in consideration of such rents and profits, is voluntary and fraudulent as to the husband's creditors.⁹¹

§ 50. **Satisfaction of wife's paraphernal rights.**—The transfer of property by a husband to his wife in payment of an indebtedness on account of paraphernal property or rights, proportionate in value to his indebtedness to her, is founded upon a sufficient consideration, and is valid as against creditors of the husband.⁹² The essentials to the validity of a *dation en paiement* by the husband to the wife, in satisfaction of her paraphernal rights, are the just and honest claim of the wife against the husband, the just proportion of the value of the thing given to the amount of the wife's claim, and the delivery to the wife of that which is the subject of the *dation*.⁹³

§ 51. **Property in excess of debt.**—A conveyance or transfer made by a husband to his wife, in consideration of a valid pre-existing debt, is subject to the general rules as to transfers in consideration of pre-existing debts, as stated in previous sections

91. O'Neal v. Seixas, 85 Ala. 80, 4 So. 745; Gilkey v. Pollock, 82 Ala. 503, 3 So. 99; Wing v. Roswald, 74 Ala. 346; Early v. Owens, 68 Ala. 171, *overruling* Brevard's Ex'r v. Jones, 50 Ala. 221; Bolling v. Jones, 67 Ala. 508. See also Long v. Efurd, 86 Ala. 267, 5 So. 482, the statute providing that such rents, etc., shall not be subject to the husband's debts, land purchased in the name of his wife with such rents can not be subjected to the husband's debts.

92. Ardis v. Theus, 47 La. Ann. 1436, 17 So. 865; Hewitt v. Williams, 48 La. Ann. 686, 19 So. 604; Freiburg v. Langfelder, 46 La. Ann.

1417, 15 So. 677; Hyman v. Schlenker, 44 La. Ann. 108, 10 So. 623; Renshaw v. Dowty, 39 La. Ann. 608, 2 So. 58; Burns v. Thompson, 39 La. Ann. 377, 1 So. 913; Chaffe v. Scheen, 34 La. Ann. 684; Payne v. Kemp, 33 La. Ann. 818; Levi v. Morgan, 33 La. Ann. 532; Lehman v. Levy, 30 La. Ann. 745; Barus v. Bidwell, 23 La. Ann. 163; Murrison v. Seiler, 22 La. Ann. 327; Judice v. Neda, 8 La. Ann. 484; Spurlock v. Mainer, 1 La. Ann. 301.

93. Colvin v. Johnston, 104 La. Ann. 655, 29 So. 274. See also Preslar & Tier v. Walker, 116 La. 661, 40 So. 1033.

of this chapter.⁹⁴ The value of the property conveyed or secured should be reasonably proportionate to the amount of the debt paid or secured;⁹⁵ the indebtedness should not be so much less than the value of the property conveyed as to make the consideration grossly inadequate;⁹⁶ and there should not be such a disparity in value between the debt and the property transferred as to affect the grantee with notice of a fraudulent intent in the transfer,⁹⁷ in order to render such a conveyance valid as against creditors. It has been held that the value of the property conveyed is what it would sell for in cash, in the ordinary course of trade, in the manner in which property is ordinarily sold in the market at the place where the property is located.⁹⁸ A judgment confessed by a husband to his wife for an amount in excess of that actually due her will not be set aside at the instance of creditors of the husband, where it appears that there was an honest mistake on the part of the wife as to the amount due.⁹⁹

§ 52. **Laches of wife in asserting claim.**—Where the money or estate of a married woman, which she might have secured to her own use, is, with her knowledge and consent, received and used by her husband, or allowed to go into the business of her husband, be mixed with his property, and applied to the purchase of real estate, or otherwise invested, for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, being dealt with by the husband as his own and debts contracted on the faith of such ownership, no

94. See chap. VIII, §§ 18-24, *supra*.

95. *McQuown v. Law*, 18 Ill. App. 34; *Brigham v. Hubbard*, 115 Ind. 474, 17 N. E. 920; *Columbia Sav. Bank v. Winn*, 132 Mo. 80, 33 S. W. 457.

96. *Paulk v. Cooke*, 39 Conn. 566; *Case Mfg. Co. v. Perkins*, 106 Mich. 349, 64 N. W. 201; *Torrey v. Cam-*

eron, 73 Tex. 583, 11 S. W. 840; *Webb v. Ingham*, 29 W. Va. 389, 1 S. E. 816.

97. *DePrato v. Jester* (Ark. 1892), 20 S. W. 807.

98. *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

99. *Falkman v. Bedillion*, 131 Pa. St. 385, 18 Atl. 922.

evidence of indebtedness being given when the loan was made or afterwards, and no claim being asserted thereto nor any interest or principal paid thereon during many years, a conveyance or transfer of property by the husband to the wife, or for her benefit, will not be sustained, but will be held as fraudulent and void as against creditors, especially where it is made upon the occurrence of his financial embarrassment, insolvency or bankruptcy.¹ A quiet acquiescence on the part of the wife that her husband should use her estate as his own, mingling it indiscriminately with his own in business, for a period of many years, without the recognition of its separate existence by even a written receipt, memorandum, or separate investment, and without any accounting during that period for principal or interest, or without its even being talked about until the *bona fide* creditors were about to call for it, constitutes such a trust or settlement as could not be allowed by any rule of law or equity to stand against the rights of antecedent creditors.²

§ 53. Conveyance in execution of prior agreement.—A conveyance or transfer of property made by a husband to his wife

1. *U. S.*—Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51.

Ala.—Wood v. Riley, 121 Ala. 100, 25 So. 723; Evans v. Covington, 70 Ala. 440.

Ga.—Nollis v. Rodgers, 106 Ga. 13, 31 S. C. 783.

Ill.—Hauk v. Van Ingen, 196 Ill. 20, 63 N. E. 705, *aff'd* 97 Ill. App. 642; Dillman v. Nadelhoffer, 56 Ill. App. 517, *aff'd* 162 Ill. 625, 45 N. E. 680; Schuberth v. Schillo, 76 Ill. App. 356, *aff'd* 177 Ill. 346, 52 N. E. 319; Miller v. Payne, 4 Ill. App. 112.

Ind.—Brookville Nat. Bank v. Kimble, 76 Ind. 195.

Iowa.—Williams v. Snyder (1903), 94 N. W. 845; McCreary v. Skinner, 83 Iowa, 362, 49 N. W. 986.

Ky.—Allen v. Meriwether, 10 Ky.

L. Rep. 600, 9 S. W. 807; Floyd v. Martin, 4 Ky. L. Rep. 891; Anderson v. Anderson, 4 Ky. L. Rep. 579.

Mo.—Balz v. Nelson, 171 Mo. 682, 72 S. W. 527.

Neb.—Brownell v. Stoddard, 42 Neb. 177, 60 N. W. 380.

N. J.—Lee v. Cole, 44 N. J. Eq. 318, 15 Atl. 531; Leathwhite v. Bennett (Ch. 1887), 11 Atl. 29; Hubbard v. Little (Ch. 1887), 10 Atl. 839; Jackson v. Beach (Ch. 1887), 9 Atl. 380; Borden v. Doughty, 42 N. J. Eq. 314, 3 Atl. 352; Watson v. Cummins, 40 N. J. Eq. 483, 4 Atl. 629.

W. Va.—Kanawha Valley Bank v. Atkinson, 32 W. Va. 203, 9 S. E. 175, 25 Am. St. Rep. 806.

2. Briggs v. Mitchell, 66 Barb. (N. Y.) 288.

or by a wife to her husband, in pursuance of a previous valid agreement between them based upon a sufficient consideration, is founded on a valuable and adequate consideration, and is not fraudulent as to creditors of the grantor.³

§ 54. **Conveyances to confirm prior conveyance.**—Where a deed by a husband to his wife was made before the passage of a statute authorizing conveyances between husband and wife direct, while the grantor was not indebted, and without intent to defraud, a subsequent deed of the same premises by a husband to the wife is valid, and vests the legal title in her, as against creditors of the husband whose claims accrued after the first deed and before the second deed. The first deed having effectually divested the husband of the equitable and beneficial ownership of the premises, and having transferred it to the wife, the subsequent conveyance of a naked legal title to the same property, though it may have been without substantial consideration, can in no sense be deemed fraudulent as against creditors of the grantor.⁴ But, although a statute authorizes transfers from a husband to his wife founded on love and affection, where a deed of gift made while the husband is solvent is withheld from record because he believes it is ineffectual and inoperative, a subsequent conveyance, made in contemplation of insolvency, to a third person who conveys the land to the wife, is fraudulent as to creditors, though made to effectuate the first conveyance.⁵

3. N. Y.—*Odell v. Mylins*, 53 How., -Ky. L. Rep. 1563, 71 S. W. 923.
Pr. 250.

Conn.—*Clarke v. Black*, 78 Conn. 480.
467, 62 Atl. 757.

Ind.—*Summers v. Hoover*, 42 Ind. 153. Compare *Cannon v. Castleman*, 164 Ind. 343, 73 N. E. 689.

Kan.—*Sproul v. Atchison Nat. Bank*, 22 Kan. 336.

Ky.—*Craig v. Conover*, 24 Ky. L. Rep. 1682, 72 S. W. 2; *Hackworth v. Johns*, 10 Ky. L. Rep. 568, 9 S. W. 656. Compare *Chinn v. Curtis*, 24

Md.—*Stockett v. Holliday*, 9 Md. 480.

Mich.—*Popendick v. Frobenius*, 66 Mich. 317, 33 N. W. 887.

Neb.—*Van Duzen v. Peacock*, 11 Neb. 245, 9 N. W. 90.

Tenn.—*Ready v. Bragg*, 38 Tenn. 511.

4. *Fitzpatrick v. Burchill*, 7 Misc. Rep. (N. Y.) 463, 28 N. Y. Supp. 389.

5. *Talcott v. Levy*, 20 N. Y. Supp.

§ 55. **Effect of want or insufficiency of consideration.**—A conveyance from the husband to the wife, without consideration, or a voluntary conveyance, is a fraud upon the creditors of the husband and void as against them, irrespective of his want of intention to commit a fraud,⁶ and even in the absence of an actual fraudulent intention.⁷ A voluntary conveyance by an insolvent debtor to his wife is good as against subsequent creditors, unless made with intent to defraud.⁸ In general, the general rules as to the effect of the want, or inadequacy, or insufficiency of consideration already set forth in this chapter,⁹ are applied by the courts to transactions between husband and wife.¹⁰

440, 29 Abb. N. Cas. 3, *aff'd* without opinion 3 Misc. Rep. (N. Y.) 615, 23 N. Y. Supp. 1162.

6. *U. S.*—Wiswell v. Jarvis, 9 Fed. 84; Beecher v. Clark, 3 Fed. Cas. No. 1,223, 12 Blatchf. 256, *modified* Clark v. Beecher, 154 U. S. 631, 14 Sup. Ct. 1184, 24 L. Ed. 705.

Cal.—Threlkel v. Scott (1893), 34 Pac. 851.

Ill.—Smith v. J. A. Sommers Mfg. Co., 69 Ill. App. 230.

Iowa.—Gardner v. Baker, 25 Iowa, 343; Sargent v. Chubbuck, 19 Iowa, 37.

Me.—Robinson v. Clark, 76 Me. 493.

Md.—Myers v. King, 42 Md. 65.

Mich.—Fallows v. Smith, 40 Mich. 689.

Miss.—Warren v. Brown, 25 Miss. 66, 57 Am. Dec. 191.

Mo.—Reppy v. Reppy, 46 Mo. 571; Woodson v. Pool, 19 Mo. 340.

N. J.—Phelps v. Morrison, 24 N. J. Eq. 195; Annin v. Annin, 24 N. J. Eq. 184.

Or.—Elfelt v. Hinch, 5 Or. 255.

Pa.—Carl v. Smith, 8 Phila. 569.

W. Va.—Humphrey v. Spencer, 36

W. Va. 11, 14 S. E. 410; Core v. Cunningham, 27 W. Va. 206.

7. *N. Y.*—Smart v. Harring, 52 How. Pr. 505.

Colo.—Phillips v. Rhodes, 21 Colo. 217, 40 Pac. 453, *aff'g* 2 Colo. App. 70, 29 Pac. 1011.

Ind.—Spinner v. Weick, 50 Ind. 213.

Iowa.—Watson v. Riskamire, 45 Iowa, 231.

Ohio.—Fowler v. Trebein, 16 Ohio St. 493, 91 Am. Dec. 95.

8. *N. Y.*—Phillips v. Wooster, 36 N. Y. 412.

Ala.—Davidson v. Lanier, 51 Ala. 318.

Cal.—Wells v. Stout, 9 Cal. 479.

Ill.—Lucas v. Lucas, 103 Ill. 121.

Ky.—Duhme v. Young, 66 Ky. 343.

Md.—Miller v. Johnson, 27 Md. 6.

Mo.—Boatmen's Sav. Bank v. Over-all, 16 Mo. App. 510.

Pa.—Tatham v. Crawford, 2 Wkly. Notes Cas. 365.

W. Va.—McClagherty v. Morgan, 36 W. Va. 191, 14 S. E. 992.

9. See chap VIII, §§ 32-37.

10. *N. Y.*—Holden v. Burnham, 63 N. Y. 74; Bennett v. McGuire, 5

§ 56. Transactions between parent and child; nature, adequacy, and sufficiency of consideration.—A parent, who is perfectly solvent, or who, although in debt, is not embarrassed in his circumstances, may make a valid conveyance to his children, and it cannot be impeached for want of consideration. Natural love and affection is a good and valid consideration in a conveyance from a parent to a child.¹¹ A voluntary con-

Lans. 183; *Cropsey v. McKinney*, 30 Barb. 47.

U. S.—*Brittain v. Crowther*, 54 Fed. 295, 4 C. C. A. 341; *Wilson v. Jordan*, 30 Fed. Cas. No. 17,814, 3 Woods, 642; *Caller v. McNabb*, 4 Fed. Cas. No. 2,322.

Ga.—*Hawkinsville Bank, etc., Co. v. Walker*, 99 Ga. 242, 25 S. E. 205.

Ill.—*Hauk v. Van Ingen*, 196 Ill. 20, 63 N. E. 705, *aff'g* 97 Ill. App. 642; *Keady v. White*, 168 Ill. 76, 48 N. E. 314, *modifying* 69 Ill. App. 405; *McCaffrey v. Dustin*, 43 Ill. App. 34.

Iowa.—*Langford v. Thurlby*, 60 Iowa, 105, 14 N. W. 135; *Boulton v. Hahn*, 58 Iowa, 518, 12 N. W. 560.

Ky.—*Plant v. Geffinger*, 22 Ky. L. Rep. 1475, 60 S. W. 520; *Clarkson v. Clarkson*, 4 Ky. L. Rep. 901.

Me.—*Motley v. Sawyer*, 38 Me. 68.

Mass.—*Williams v. Thomson*, 30 Mass. 298.

Mich.—*Riggs v. Whitaker*, 130 Mich. 327, 89 N. W. 954; *Palmer v. Smith*, 126 Mich. 352, 85 N. W. 870; *Blue v. Schurtz*, 115 Mich. 690, 74 N. W. 178.

Mo.—*Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616; *State v. Jones*, 83 Mo. App. 151.

Neb.—*Hill v. Smuck*, 65 Neb. 173, 90 N. W. 928.

N. H.—*Clafin v. Batchelder*, 65 N. H. 29, 17 Atl. 1060.

N. C.—*Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482.

Pa.—*In re McKown*, 198 Pa. St. 96, 47 Atl. 1111; *Henderson v. Henderson*, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650; *Stickney v. Borman*, 2 Pa. St. 67.

Tenn.—*Gribble v. Ford* (Ch. App. 1898), 52 S. W. 1007.

Tex.—*Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277.

Utah.—*Gustin v. Mathews*, 25 Utah, 168, 70 Pac. 402.

Vt.—*Farmers's Nat. Bank v. Thomson*, 74 Vt. 442, 52 Atl. 961.

Va.—*Tebbs v. Lee*, 76 Va. 744.

Wash.—*Klosterman v. Harrington*, 11 Wash. 138, 39 Pac. 376.

W. Va.—*Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

Wis.—*Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772; *Wheeler, etc., Mfg. Co. v. Monahan*, 63 Wis. 198, 23 N. W. 127; *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. 681; *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599.

11. *N. Y.*—*Brown v. Austen*, 35 Barb. 341.

U. S.—*King v. Thompson*, 34 U. S. 204, 9 L. Ed. 102.

D. C.—*Offutt v. King*, 1 MacArthur, 312.

Ill.—*Davis v. Kennedy*, 105 Ill. 300.

S. C.—*Smith v. Smith*, 24 S. C. 304.

Vt.—*Brackett v. Waite*, 4 Vt. 389.

Va.—*Charlton v. Gardner*, 11 Leigh, 281.

Contra.—*Folmar v. Lehman Durr Co.* (Ala.), 41 So. 750.

veyance of a parent to a child, in consideration of love and affection, is not *per se* fraudulent and void, as to existing creditors;¹² but a conveyance by a debtor to his child of all his property, based on love and affection only, is voluntary and fraudulent as to creditors.¹³ Where the effect of a conveyance by a parent to a child, for a consideration of love and affection, is to hinder and delay creditors, such conveyance is voluntary and void as to such creditors.¹⁴ And where the consideration for a conveyance from a parent to a child is so grossly inadequate as to raise a presumption of fraudulent intent, the conveyance will be set aside as fraudulent as to creditors.¹⁵ The general rules on the subject of the nature, source, adequacy, and sufficiency of consideration, set forth in preceding sections of this chapter,¹⁶ are in the main applicable to transactions between parent and child.¹⁷ Where a mother received certain funds to be used for

12. *N. Y.*—Seward v. Jackson, 8 Cow. 406.

U. S.—Hinde v. Longworth, 24 U. S. 199, 6 L. Ed. 454.

Conn.—Salmon v. Bennett, 1 Conn. 525, 7 Am. Dec. 237.

Md.—Worthington v. Shipley, 5 Gill. 499.

Mass.—Lerow v. Wilmarth, 91 Mass. 382.

Miss.—Wilson v. Kohlheim, 46 Miss. 346.

But see *Campbell v. Campbell* (Iowa, 1906), 105 N. W. 583, holding such a conveyance constructively fraudulent as to existing creditors, unless the grantor has remaining after the conveyance sufficient property to satisfy his creditors.

13. *N. Y.*—Holmes v. Clark, 48 Barb. 237.

Ill.—Russell v. Fanning, 2 Ill. App. 632.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 847.

N. J.—Laurence v. Lippencott, 6 N.

J. L. 473; *Lockyer v. DeHart*, 6 N. J. L. 450.

Pa.—In re Kern's Estate, 4 Pa. Dist. R. 73.

14. *Yankee v. Sweeney*, 85 Ky. 55, 2 S. W. 559, 8 Ky. L. Rep. 944; *Franklin v. Cooper*, 19 Ky. L. Rep. 1976, 44 S. W. 976; *Dunlap v. Mitchell*, 80 Mo. App. 303, 2 Mo. App. Rep. 600; *Hayes v. Moore*, 5 Ohio S. & C. Pl. Dec. 520, 5 Ohio N. P. 220.

15. *Johnston Harvester Co. v. Cibula*, 62 Iowa, 697, 13 N. W. 418; *First Nat. Bank v. Cummins*, 38 N. J. Eq. 191. See also chap. 9, §§ 29-37, *supra*.

16. See chap. VIII, §§ 1-37, *supra*.

17. *N. Y.*—Hyde v. Houston, 77 Hun, 609, 29 N. Y. Supp. 818; *Lawrenceville Cement Co. v. Parker*, 60 Hun, 586, 15 N. Y. Supp. 577, 21 Civ. Proc. R. 263.

Ala.—Abney v. Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

the benefit of her daughters from their grandfather, and she used the same with the daughters' apparent consent, for the maintenance of a college boarding house, in which she received the daughters' services, such gift did not create a trust in favor of the daughters, so that its use would constitute a sufficient consideration for a conveyance by the mother to the daughters, as against the mother's creditors.¹⁸

Cal.—*Salmon v. Wilson*, 41 Cal. 595.

Ind.—*Proctor v. Cole*, 104 Ind. 373, 4 N. E. 303, a son may, without being guilty of maintenance, assist his father in conducting an action, and the promise of the father to repay the sum advanced is a valid one, as against creditors; *Goff v. Rogers*, 71 Ind. 459.

Iowa.—*Bunn v. Cheney*, 36 Iowa, 697.

Kan.—*Hunt v. Spencer*, 20 Kan. 126.

Ky.—*Trimble v. Ratcliff*, 48 Ky. 511; *Walker v. Todd*, 33 Ky. 503, 28 Am. Dec. 94; *Caldwell v. Deposit Bank*, 18 Ky. L. Rep. 156, 35 S. W. 625; *Daniel v. Brandenburgh*, 14 Ky. L. Rep. 310, 20 S. W. 255; *Merritt v. Merritt*, 11 Ky. L. Rep. 493, 11 S. W. 593; *Green v. Green*, 4 Ky. L. Rep. 250.

La.—*Maurin v. Rouquer*, 19 La. 594.

Me.—*Bowman v. Handlette*, 18 Me. 245.

Md.—*Benson v. Benson*, 70 Md. 253, 16 Atl. 657; *Bullett v. Worthington*, 3 Md. Ch. 99.

Mo.—*Dozier v. Watson*, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388; *Donavan v. Dunning*, 69 Mo. 436; *Rumbolds v. Parr*, 51 Mo. 592.

N. J.—*Taylor v. Dawes* (Ch. 1888), 13 Atl. 593; *Hoboken Bank v. Beckman*, 33 N. J. Eq. 53.

N. C.—*Webb v. Atkinson*, 124 N. C. 447, 32 S. W. 737; *National Bank of Greensboro v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *Morris v. Allen*, 32 N. C. 203; *Buie v. Kelly*, 27 N. C. 169.

Pa.—*Ketner v. Donten*, 15 Pa. Super. Ct. 604; *Harmon's Lessee v. Reese*, 1 Browne, 11.

S. C.—*Jackson v. Lewis*, 29 S. C. 193, 7 S. E. 252.

Tenn.—*Gaugh v. Henderson*, 39 Tenn. 628; *Phillips v. Cunningham* (Ch. App. 1899), 58 S. W. 463; *Grimmett v. Midgett* Ch. App. 1899), 57 S. W. 399; *Carpenter v. Scales* (Ch. App. 1897), 48 S. W. 249.

Tex.—*Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87; *Hawkins v. Cramer*, 63 Tex. 99.

Va.—*Parr v. Saunders* (1880), 11 S. E. 979; *Stokes v. Oliver*, 76 Va. 72; *Braxton v. Gaines*, 4 Hen. & M. 151.

W. Va.—*Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451.

A mother-in-law may pay her son-in-law for her board and living expenses, while a member of his family, without any previous agreement for compensation, as against her other creditors. *Pettyjohn v. Newhart*, 7 Kan. App. 64, 51 Pac. 69, citing *Howard v. Rynearsen*, 50 Mich. 307, 15 N. W. 486.

18. *Vreeland v. Rogers* (N. J. Ch. 1905), 61 Atl. 486.

§ 57. **Earnings of minor child.**—A father, by investing the earnings of his minor children in real estate, and taking title in their names, cannot protect the property from his debts,¹⁹ since he is entitled to the earnings of such children where there has been no emancipation before the earnings were made;²⁰ nor are the earnings of a minor son a sufficient consideration to support a conveyance to him from his father, as against the father's creditors, but such a conveyance is fraudulent and void.²¹ But where a father has emancipated his children, giving them the right to receive and appropriate to their own use their earnings,²² they are entitled to their earnings as against their father's creditors; and where such earnings were loaned to the father or received by him under a valid agreement to repay the same, or to convey property to them in consideration therefor, they constitute a good consideration for a conveyance from him to them, as against his creditors.²³

§ 58. **Services rendered by minor child.**—The services of a child, rendered during minority to his father, are not a valuable consideration for a conveyance from the father to him, since a child is in law bound to labor for his parents in consideration

19. *Bell v. Hollenbach*, Wright (Ohio), 751.

20. See *Wages of debtor's minor child*, chap. IV, § 10, *supra*.

21. *Winchester v. Reid*, 53 N. C. 377. Compare *Rains v. Dunnegan* 71 Mo. 148. See also *Wages of debtor's minor child*, chap. IV, § 10, *supra*; *Services rendered by minor child*, chap. VIII, § 58, *infra*.

22. *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386, a father acting in good faith, may, though insolvent at the time, make a valid gift to his minor son of his time and future earnings.

23. N. Y.—*McCaffrey v. Hickey*, 66 Barb. 489.

Mass.—*Jenney v. Alden*, 12 Mass. 375.

N. J.—*Berla v. Meisel* (Ch. 1902), 52 Atl. 999, son entitled, as against creditors of the debtor, to a mortgage given him on property conveyed by the debtor to his wife and paid for in part by the son's earnings.

Or.—*Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645.

Tenn.—*Rosenbaum v. Davis* (Ch. App. 1898), 48 S. W. 706, child thirteen years of age.

Vt.—*Chase v. Elkins*, 2 Vt. 290.

Can.—*Jack v. Greig*, 27 Grant Ch. (U. C.) 6. See also as above last note.

of the latter's furnishing him maintenance and education, and, therefore, such a conveyance is purely voluntary, and void as to creditors of the parents,²⁴ and may be set aside like other conveyances of this character for want of consideration.²⁵ But a father, as stated elsewhere, may emancipate his minor children, in which case they would become competent to contract as if of full age,²⁶ and if the father, though insolvent, enters into a *bona fide* contract with his children to pay for services performed by them under such contract, or to compensate them by giving them certain property, such services are a sufficient consideration for conveyances executed by him in satisfaction or security of their claims against him, and the same will be upheld as against his creditors.²⁷

§ 59. **Services rendered by a child after majority.**—In the absence of an express contract or clear evidence of a contract to pay for such service, services rendered by children who have attained their majority, to their parents while residing and living with them, do not constitute a valuable consideration for con-

24. *U. S.*—*Dowell v. Applegate*, 15 Fed. 419, 8 Sawy. 427.

Ala.—*Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58.

Cal.—*Schwartz v. Hazlett*, 8 Cal. 118.

Iowa.—*Gamet v. Simmons*, 103 Iowa, 163, 72 N. W. 444, services of a minor stepchild are not a sufficient consideration.

Kan.—*Stumbaugh v. Anderson*, 46 Kan. 541, 26 Pac. 1045.

Md.—*Bullett v. Worthington*, 3 Md. Ch. 99.

Miss.—*Dick v. Grissom*, 1 Freem. Ch. 428, but such a conveyance is void as between father and son.

N. J.—*Gardner's Adm'r v. Schooley*, 25 N. J. Eq. 150. See *Vreeland v. Rogers* (Ch. 1905), 61 Atl. 486, services of the minor child rendered

for the mother are not a sufficient consideration.

Or.—*Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645. See *Wages or earnings of debtor's minor child*, chap. IV, § 10, *supra*.

25. See *Effect of want of consideration*, chap. VIII, §§ 32-36, *supra*.

26. See *Wages or earnings of debtor's minor child*, chap. IV, § 10, *supra*.

27. *N. Y.*—*Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105, *rev'g* 17 N. Y. Supp. 223, conveyance, by a father to his daughter in consideration of services rendered by her in support of the family under a promise of the father to give her real estate in return, sustained.

U. S.—*Wilson v. Jones*, 76 Fed. 484.

veyances or transfers of property from the parents to them, as against the creditors of the parents; the law implies no promise to pay for services rendered each other by persons standing in this relation, but such services are deemed gratuitous.²⁸ A conveyance by an insolvent parent, however, to his child, in payment of a *bona fide* debt due the child for services actually rendered, after majority and while living with the parent, under an agreement for a specified and reasonable rate of compensation, is valid as against creditors of the parent.²⁹

Ga.—Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115, where the father promised his minor child a reasonable part of a prospective crop for the child's labor.

Ill.—Heeren v. Kitson, 28 Ill. App. 259, where a father agreed to pay his minor son as much as any other man would give him for his services.

Ky.—Perry's Adm'r v. Cornelius, 23 Ky. L. Rep. 25, 63 S. W. 23, where a father agreed to give his minor children a certain portion of the crops raised on the farm for their services.

Neb.—Clemens v. Brillhart, 17 Neb. 335, 22 N. W. 779, a mortgage given by a father to his minor son, to secure alleged wages due, sustained as against a creditor of the father.

Pa.—Appeal of Brown, 86 Pa. St. 524, confession of judgment, by an insolvent father in favor of his minor son for services rendered on a verbal promise to pay, held valid as against creditors.

See also Wages or earnings of debtor's minor child, chap. IV, § 10, *supra*; § 56, *supra*.

Contra, where the child remains at home and lives with the father. Dowell v. Applegate, 15 Fed. 419, 8 Sawy. 427; Godfrey v. Hays, 6 Ala. 501, 41 Am. Dec. 58. But where an

infant son supported himself, and paid his board at home, he was emancipated. Donegan v. Davis, 66 Ala. 382.

28. N. Y.—Breen v. Henry, 34 Misc. Rep. 232, 69 N. Y. Supp. 627.

Ill.—Guffin v. First Nat. Bank, 74 Ill. 259.

Iowa.—Irish v. Bradford, 64 Iowa, 303, 20 N. W. 447; Hart v. Flinn, 36 Iowa, 366.

Mich.—Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159.

Minn.—McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589.

Mo.—Snyder v. Free, 114 Mo. 360, 21 S. W. 847.

N. H.—Lord v. Locke, 62 N. H. 566.

N. J.—Miller v. Sauerbier, 30 N. J. Eq. 71.

Pa.—Sanders v. Wagonseller, 19 Pa. St. 248; Hack v. Stewart, 8 Pa. St. 213.

29. U. S.—Vansickle v. Wells, 105 Fed. 25.

Ala.—Halsey v. Connell, 111 Ala. 221, 20 So. 445.

Iowa.—Citizens' State Bank v. Weston, 103 Iowa, 736, 72 N. W. 542; Chadwick v. Devore, 69 Iowa, 637, 29 N. W. 757; Collier v. French, 64 Iowa, 577, 21 N. W. 90; Hunt v. Hoover, 34 Iowa, 77.

§ 60. **Services rendered by grandchild.**—A conveyance to a grandchild, pursuant to a promise to convey, in consideration of the grandchild remaining with the grandparent and working for him during minority, is based upon a sufficient consideration, as against creditors of the grandparent; he being under no obligation to work without remuneration, as is the rule in the case of a parent and a minor child.³⁰

§ 61. **Future support generally.**—As a rule, an agreement between a parent and his child for the future support by the latter of his parents, is not such a consideration as will support a conveyance or transfer of property from the parent to the child, as against existing creditors of the parent who are prejudiced thereby, but such conveyance is a voluntary settlement, and void as against them.³¹ It is, however, valid as to subsequent

Kan.—*Mitchell v. Simpson*, 62 Kan. 343, 63 Pac. 440.

Minn.—*Leque v. Stoppel*, 64 Minn. 152, 66 N. W. 124.

N. J.—*Low v. Wortman*, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586, where no account of such services had been kept.

Tenn.—*Gardenshire v. White* (Ch. App. 1900), 59 S. W. 661.

Tex.—*Barnett v. Vincent*, 69 Tex. 685, 7 S. W. 525.

W. Va.—*Stuart v. Neely*, 50 W. Va. 508, 40 S. E. 441.

Wis.—*Byrnes v. Clarke*, 57 Wis. 13, 14 N. W. 815; *Manseau v. Mueller*, 45 Wis. 430; *Seymour v. Briggs*, 11 Wis. 196. *Compare Haney v. Nugent*, 13 Wis. 283.

30. *Dowell v. Applegate*, 15 Fed. 419, 8 Sawy. 427.

31. *N. Y.*—*Spotten v. Keeler*, 12 St. Rep. 385; *Jackson v. Parker*, 9 Cow. 73. *Compare Seward v. Jackson*, 8 Cow. 406, *rev'g* 5 Cow. 67.

Ala.—*Stokes v. Jones*, 21 Ala. 731.

Conn.—*Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610.

Ill.—*Guffin v. First Nat. Bank*, 74 Ill. 259; *Funk v. Lawson*, 12 Ill. App. 229.

Ind.—*Tyner v. Somerville, Smith*, 149.

Iowa.—*Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Graham v. Rooney*, 42 Iowa, 567.

Ky.—*Howell v. Smith*, 1 Ky. L. Rep. 415. *Compare Layton v. Calhoun Bank*, 22 Ky. L. Rep. 872, 59 S. W. 322.

Me.—*Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663.

Mass.—*Slater v. Dudley*, 35 Mass. 373; *Gunn v. Butler*, 35 Mass. 248, but such a conveyance is not fraudulent *per se*.

Mich.—*Rynearson v. Turner*, 52 Mich. 7, 17 N. W. 219; *Pursel v. Armstrong*, 37 Mich. 326.

Ohio.—*Bowlus v. Shanabarger*, 19

creditors.³² A conveyance by a father to his son, in consideration that the grantee shall support his invalid brothers, is not a voluntary deed, but rests on a valuable consideration, and to avoid it as to creditors a fraudulent intent must be shown.³³

§ 62. **Future support as part of consideration.**—An agreement by a child to support his parents in the future, as a part of the consideration of a conveyance from his father, does not necessarily show the conveyance to be fraudulent as to the grantor's creditors.³⁴ A conveyance by a parent to a child on the consideration, in part, that the grantee will provide support and

Ohio Cir. Ct. 137, 10 Ohio Cir Dec. 167.

Pa.—Geiger v. Welsh, 1 Rawle, 349. See also chap. IX, § 10, *supra*.

Compare Worthington v. Jones, 23 Vt. 546.

A stipulation that the lessee shall keep a cow for the lessor, contained in a lease of property by an insolvent to his son, is not such a contract for the support of the lessor as will avoid the lease. Stanley v. Robbins, 36 Vt. 422.

Security for agreement to support.—Where an insolvent debtor attempts to appropriate his property to the benefit of himself and wife during their several lives, by a conveyance to his son in consideration of future support, the agreement being secured by a mortgage back on the property, such mortgage is fraudulent and void as to creditors. Dewitt v. Vansickle, 29 N. J. Eq. 209. Where a father conveyed land to his son, the deed expressing a valuable consideration, but the son verbally engaging to support the grantor during life; and a year afterwards the son, being about to die insolvent, gave a mortgage to the father conditioned

for his support during the residue of his life, it was held, in an action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against creditors of the son. Tyler v. Carlton, 7 Me. 175, 20 Am. Dec. 357.

An agreement by a son to support his father's family and cultivate his farm, in consideration of the residue of the crops after feeding the stock, is valid, in the absence of extrinsic evidence of fraud. Glasgow v. Turner, 91 Tenn. 163, 18 S. W. 261.

32. Falcoun v. McIntyre, 118 Ill. 292, 8 N. E. 315; Buchanan v. Clark, 28 Vt. 799; Rutland, etc., R. Co. v. Powers, 25 Vt. 15. But see McLean v. Button, 19 Barb. (N. Y.) 450, holding a conveyance of personal property to be a transfer of personal property in trust for the use of the grantor within the prohibition of the statute, and, therefore, void against subsequent creditors.

33. Worthy v. Brady, 91 N. C. 265.

34. Vial v. Mathewson, 34 Hun (N. Y.) 70; Hapgood v. Fisher, 34 Me. 407, 56 Am. Dec. 663; Doughty v. Harsel, 91 Mo. 500, 3 S. W. 63.

maintenance for the grantor or members of his family, is, however, fraudulent and void as to existing creditors, where the agreement for such support furnishes a substantial part of the consideration, and the remainder is inadequate.³⁵ But, if a conveyance by a parent to his child is otherwise valid, and is supported by a sufficient consideration, the fact that the grantee gratuitously agrees to support his parents for life does not invalidate the conveyance, as in fraud of creditors.³⁶

§ 63. **Past support as part of consideration.**—Services rendered and money expended by a child in caring for and supporting a parent, in accordance with an agreement between them, is a sufficient consideration for a subsequent conveyance from the parent to the child, and such conveyance is not fraudulent as to creditors, the conveyance being in payment of a valid debt due for past support.³⁷ But services so rendered and money expended, in the absence of a prior contract, do not constitute a valuable consideration for a conveyance by the parent of all his property to his child, so as to render it valid as against his creditors.³⁸

§ 64. **Assumption of debts.**—A conveyance from a parent to his child or from a child to his parent, in consideration of

35. *N. Y.*—*Kain v. Larkin*, 4 App. Div. 209, 38 N. H. Supp. 546.

Ill.—*Gordon v. Reynolds*, 114 Ill. 118, 28 N. E. 455; *Lawson v. Funk*, 108 Ill. 502; *Vanston v. Davidson*, 41 Ill. App. 646.

Ky.—*Marshall v. Strange*, 10 Ky. L. Rep. 410, 9 S. W. 250.

N. H.—*Morrison v. Morrison*, 49 N. H. 69; *Albee v. Webster*, 16 N. H. 362.

Pa.—*Sanders v. Wagonseller*, 19 Pa. St. 248; *Miner v. Warner*, 2 Grant, 448; *Johnson's Heirs v. Harvey*, 2 Pen. & W. 82, 21 Am. Dec. 426.

36. *N. Y.*—*Bent v. Bent*, 50 Hun, 602, 3 N. Y. Supp. 750.

Ky.—*Easum v. Pirtle*, 81 Ky. 561; *Nichols v. Walker*, 7 Ky. L. Rep. 295.

Mo.—*Jones v. Geery*, 153 Mo. 476, 55 S. W. 73.

Or.—*Jolly v. Kyle*, 27 Or. 95, 39 Pac. 999.

37. *Nichols, Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737; *Sweatman v. Spears*, 6 Ky. L. Rep. 515; *Howard v. Ryneearson*, 50 Mich. 307, 15 N. W. 486; *Kelsey v. Kelley*, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640.

38. *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847.

an agreement on the part of the grantee to pay the debts of the grantor, is not fraudulent and void as to creditors of the grantor.³⁹ But a conveyance by a father to his child, made and accepted with the intention of hindering and delaying the father's creditors, is fraudulent and void as to creditors.⁴⁰ Likewise, a conveyance from a father to his child, where the value of the property conveyed is so greatly in excess of the amount of the debts assumed as to raise the presumption of fraud, will be held fraudulent as to creditors.⁴¹ Where a father conveys land to his child, the latter agreeing to discharge the incumbrances thereon, the conveyance as to the surplus of the value of the land above the incumbrances, is without consideration, and void as to creditors of the father.⁴²

§ 65. **Payment of pre-existing debts.**—A *bona fide* pre-existing debt or other liability is a valuable and sufficient consideration for a conveyance or transfer of property from a parent to his child, or from a child to its parent, where the property conveyed or transferred is fairly proportionate in value to such a debt or liability, or the indebtedness is not materially less than the reasonable value of the property.⁴³ Advancements made by

39. *Jenkins v. Peace*, 46 N. C. 413; *Jolly v. Kyle*, 27 Or. 95, 39 Pac. 999; *Pattison v. Stewart*, 6 Watts & S. (Pa.) 72; *Willis v. Heath* (Tex. 1891), 18 S. W. 801. See also chap. VIII, § 14, *supra*.

40. *Grieb v. Caraker*, 69 Ill. App. 236; *Brady v. Briscoe*, 25 Ky. 212, a transfer by a father of all his property to his son to pay just debts, and to evade the payment of unjust debts, is fraudulent.

41. *Clark v. Raymond*, 86 Iowa, 661, 53 N. W. 353; *Jessup v. Johnstone*, 48 N. C. 335, 67 Am. Dec. 243.

42. *Priest v. Conklin*, 38 Ill. App. 180.

43. *N. Y.*—*National Bank of Port Jervis v. Bonnell*, 46 App. Div. 302,

61 N. Y. Supp. 521, *aff'g* 26 Misc. Rep. 541, 57 N. Y. Supp. 486; *Saugerties Bank v. Mack*, 34 App. Div. 494, 54 N. Y. Supp. 360; *Footte v. Stryker*, 10 N. Y. Supp. 472, 12 N. Y. Supp. 178.

U. S.—*Gorrell v. Dickson*, 26 Fed. 454.

Ala.—*Donegan v. Davis*, 66 Ala. 362.

Ill.—*Schuberth v. Schillo*, 177 Ill. 346, 52 N. E. 319, *aff'g* 76 Ill. App. 356.

Ind.—*Clow v. Brown* (App. 1904), 72 N. E. 534.

Iowa.—*Rockford Boot, etc., Mfg. Co. v. Mastin*, 75 Iowa, 112, 39 N. W. 219.

a parent to a child, who thereafter becomes financially embarrassed, cannot be changed in character so as to become debts to the injury of creditors, and, hence, cannot constitute a valid consideration as against creditors for a conveyance by the child to the parent.⁴⁴ Money furnished by a parent to a child, without any contemporaneous understanding or agreement concerning its repayment, will be presumed to have been intended as an advancement, with no present purpose to treat it as a debt, and it cannot afterwards be converted into a debt without the intervention of some new consideration.⁴⁵ A subsequent deed confirming a prior valid conveyance of the same property is not in fraud of creditors, as where a father conveys land to his sons, retaining sufficient property to pay his creditors, and delivers the deed in escrow, and such deed is destroyed before the grantees have performed the condition necessary for the passage of title.⁴⁶

Kan.—Beavers v. McKinley, 50 Kan. 602, 32 Pac. 363, 33 Pac. 359, fictitious debt.

Md.—McNeal v. Glenn, 4 Md. 87.

Mass.—F. & M. Schaeffer Brewing Co. v. Moebs, 187 Mass. 571, 73 N. E. 858.

Mich.—Rindge v. Grow, 99 Mich. 482, 58 N. W. 468; Nichols v. Bancroft, 74 Mich. 191, 41 N. W. 891; Woodhull v. Whittle, 63 Mich. 575, 30 N. W. 368, *aff'g* State Bank v. Whittle, 48 Mich. 1, 11 N. W. 756.

Miss.—Davis v. Harris, 21 Miss. 9, debt due from parent as guardian of child.

Neb.—Carson v. Murphy, 1 Neb. (Unoff.) 519, 96 N. W. 110.

N. J.—Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. 584; First Nat. Bank v. Cummins, 38 N. J. Eq. 191; Updike v. Titus, 13 N. J. Eq. 151.

Ohio.—Webb v. Roff, 9 Ohio St. 430.

Pa.—Sebring v. Brickley, 7 Pa.

Super. Ct. 198, 42 Wkly. Notes Cas. 189.

Tex.—Barnett v. Vincent, 69 Tex. 685, 7 S. W. 525, 4 Am. St. Rep. 98.

Va.—Grayson v. George, 85 Va. 908, 9 S. E. 13.

W. Va.—Knight v. Capito, 23 W. Va. 639.

A claim of a father for board of a son is not a valid consideration, as against creditors, for a conveyance by the son to the father, where there was no agreement, express or implied, on the part of the son to pay for the board. *Morrow v. Campbell*, 118 Ala. 330, 24 So. 852.

44. *Pearson v. Cuthbert*, 58 App. Div. (N. Y.) 395, 68 N. Y. Supp. 1031; *Bomar v. Means*, 53 S. C. 232, 31 S. E. 234.

45. *Edison Electric Illuminating Co. v. Riker*, 90 Hun, 608, 35 N. Y. Supp. 906; *Higham v. Vanosdol*, 125 Ind. 74, 25 N. E. 140.

46. *Gudgel v. Kitterman*, 108 Ill. 50.

§ 66. **Effect of want or insufficiency of consideration.**—The general rules as to want and inadequacy of consideration as an element of fraud affecting the validity of conveyances, set forth in preceding sections of this chapter,⁴⁷ are applicable to transactions between parents and their children.⁴⁸ The wife's equity, if she does not secure it in her lifetime, does not survive to her children, and where a legacy to her is vested in her husband by her death, his transfer of a portion of it to their infant child, is fraudulent as against his existing creditors.⁴⁹ A conveyance by an insolvent debtor to his son without consideration will be conclusively presumed to be fraudulent as to creditors, whatever may have been the intent of the parties.⁵⁰ A conveyance by a father to his son without consideration and for the purpose of defrauding his creditors is void as to the creditors.⁵¹ A debtor's conveyance to his son and son-in-law, who in good faith pay him about a third of its value, is fraudulent as to creditors.⁵² A con-

47. See chap. VIII, §§ 32-37, *supra*.

48. *Ala.*—Harrell v. Mitchell, 61 Ala. 270; Hubbard v. Allen, 59 Ala. 283.

Ill.—Stevens v. Dillman, 86 Ill. 233.

Ind.—O'Brien v. Coulter, 2 Blackf. 421; Farmers' Bank v. First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503.

Iowa.—Cloud v. Malvin (1898), 75 N. W. 645.

Ky.—Loving v. Sweeney, 20 Ky. L. Rep. 1654, 49 S. W. 961.

Md.—Richards v. Swan, 7 Gill. 366.

Miss.—Moore v. Jeffries (1895), 18 So. 272.

Mo.—Ridenour-Baker Grocery Co. v. Monroe, 142 Mo. 165, 43 S. W. 633.

Neb.—First Nat. Bank v. Reece, 64 Neb. 292, 89 N. W. 804, where the only consideration was the payment

of the interest on a mortgage on the property.

N. H.—Caswell v. Hill, 47 N. H. 407, a gift of a musical instrument to a stepdaughter from her stepfather is not valid, as against existing creditors.

Tenn.—Walter v. Hartman (1902), 67 S. W. 476.

Tex.—Hughes v. Roper, 42 Tex. 116; Walters v. Cantrell (Civ. App. 1902), 66 S. W. 790.

Vt.—Dewey v. Long, 25 Vt. 564.

Va.—Norris v. Jones, 93 Va. 176, 24 S. E. 911.

Wis.—Fischer v. Schultz, 98 Wis. 462, 74 N. W. 222.

49. Barker v. Woods, 1 Sandf. Ch. (N. Y.) 129.

50. Austin v. First Nat. Bank, 47 Ill. App. 224.

51. Burtch v. Elliot, 3 Ind. 99.

52. Adams' Assignee v. Branch, 3 Ky. L. Rep. 178.

veyance of property by a debtor in failing circumstances to his child for a very small portion of its value is fraudulent and void as to his existing creditors.⁵³ A transfer to one's stepdaughter, based on a promise which is not binding on the promisor, is voluntary and fraudulent as to creditors, where the grantor has no other property left with which to pay his debts.⁵⁴

53. *Lionberger v. Baker*, 14 Mo. App. 353, *aff'd* 88 Mo. 447, conveyance of property worth \$14,000 for \$100.

54. *Gamet v. Simmons*, 103 Iowa, 163, 72 N. W. 444.

CHAPTER IX.

CONFIDENTIAL RELATIONS OF PARTIES.

- Section 1.** Transactions between persons in fiduciary and friendly relations.
2. Transactions between employer and employee.
 3. Transactions between relatives in general.
 4. Transactions between husband and wife.
 5. Purchase of husband's property at private or public sale.
 6. Conveyances to wife from third persons.
 7. Giving false credit to husband.
 8. Transactions between parent and child.
 9. Procuring conveyance from third person.

Section 1. Transactions between persons in fiduciary and friendly relations.—Where parties occupy intimate and confidential relations, transactions between them are subject to more careful scrutiny than those between strangers, and, when such transactions conflict with the rights of others, such parties are held to closer proof of their fairness.¹ Evidence of confidential business relations existing between the parties, as, for example, that the grantor and grantee were partners in the property conveyed at the time the instrument was executed, is admissible to show fraudulent intent.² No presumption of fraud attaches because the debtor conveyed to a personal friend,³ and the fact that the conveyance was made to an intimate friend does not of itself render it invalid;⁴ but it may be sufficient to avoid the convey-

1. *Leavitt v. La Force*, 71 Mo. 353. See Evidence—presumptions and burden of proof as affected by relationship of parties, chap. XVII, § 4, *infra*. Weight and sufficiency—transactions between relatives, chap. XVII, § 49, *infra*.

2. *Curtis v. Wilcox*, 91 Mich. 229, 51 N. W. 992; *Strong v. Hines*, 35

Miss. 201; *Heilbronner v. Lloyd*, 17 Mont. 299, 42 Pac. 843; *Blum v. Jones*, 86 Tenn. 492, 25 S. W. 694.

3. *Schroeder v. Walsh*, 16 Ill. App. 590, *aff'd* 120 Ill. 403, 11 N. E. 70.

4. *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. See also *Baker v. Dobyms*, 34 Ky. 220; *Buford v. Cook*, 36 Fed. 21.

ance when taken in connection with other unexplained suspicious circumstances.⁵ A conveyance by a debtor of all his property to his attorney in the case has been held to be constructively fraudulent,⁶ but it has also been held that a sale, sustained by a verdict, will not be annulled simply because the vendee was formerly the vendor's counsel.⁷ Fraud can be inferred from the circumstance that the vendee acted as agent and trustee of the vendor in other transactions, taken in connection with other suspicious circumstances.⁸ A purchase by a *cestui que trust* at a sale by the trustee under the trust deed given to secure an obligation to the *cestui que trust* may be set aside at the instance of creditors of the grantor of the trust deed.⁹ But where a trustee purchased the interest of his *cestui que trust* in perfect good faith, and for an adequate price, and after a full disclosure to the latter of all the facts concerning the property and the transaction, and without any purpose on his part, or knowledge of a purpose on the part of the *cestui que trust*, to defraud the latter's creditors, such creditors could not impeach the trustee's title to the trust fund.¹⁰ A conveyance by a debtor of all his property to a woman with whom he cohabited, there being no proof of any payment of money by her, has been held void as to existing creditors.¹¹ But a woman who has lived with a man and had children by him, but has not assumed his name, nor been reported to be his wife, is not thereby disabled from acquiring property from him by gift or contract, and will hold the same as against subsequent creditors of the grantor.¹²

5. DeWalt v. Doran, 21 D. C. 163.

6. Summers v. Taylor, 80 Ky. 429.

7. White v. Slaughter, 5 La. Ann. 136.

8. Hendricks v. Walden, 17 Johns. (N. Y.) 438; Hendricks v. Robinson, 2 Johns. (N. Y.) 283; Roan v. Winn, 93 Mo. 503, 4 S. W. 736, where a bank transferred property to one of its directors.

9. Chester v. Greer, 24 Tenn. 26. See also Cabill v. Hamilton-Brown

Shoe Co., 81 Tex. 104, 16 S. W. 811, conveyance by debtor to ward in satisfaction of the latter's claim, without his knowledge, held void as to creditors.

10. Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692.

11. Somer's Adm'rs v. Smyth, 3 Desaus. (S. C.) 214.

12. Winebrinner v. Weisiger, 19 Ky. 32.

§ 2. **Transactions between employer and employee.**—A conveyance by an insolvent debtor to his employee under circumstances which clearly show a scheme to defraud the creditors of the debtor will be held fraudulent and void as to creditors.¹³ Where a vendor, who is known to be totally insolvent by his confidential clerk and manager, sells to the latter, who has no means, his whole stock of goods, on long credit and without security, the sale will be declared fraudulent and simulated.¹⁴ Where a merchant, unable to meet his debts and expecting to be pressed by creditors, sells his goods to a clerk in his employ who has limited means, the sale being made on long credit and without security, and then takes employment from his former clerk and aids in carrying on the business at a salary nearly double that which the clerk before received, the transaction is fraudulent and void as to the creditors.¹⁵ Where a debtor conveyed lands to one in his employ who subsequently mortgaged the same to him, and he afterwards acted as and for the grantee in negotiating for the sale of the land, and the land was conveyed to others and mortgaged back to him, the original conveyance was held fraudulent as to creditors.¹⁶

§ 3. **Transactions between relatives in general.**—The relationship of parties to a conveyance to each other, by blood or marriage, though regarded as a circumstance which should awaken suspicion, is of itself, without other facts and circumstances, no evidence of fraud in a conveyance of property, and

13. *Johnston v. Ferris*, 12 St. Rep. (N. Y.) 666, where the evidence showed a sale of the business of a debtor to his clerk, and the subsequent failure and assignment of the vendee after he had executed a confession of judgment to the vendor by which the latter was enabled to repossess himself of the stock in trade or its proceeds, freed from his own debts as well as the debts incurred by such vendee while he carried on

the business; *Vance v. Phillips*, 6 Hill (N. Y.), 433, where one in insolvent circumstances sold his stock of goods to his clerk, an infant and a brother-in-law, took the infant's notes, and absconded.

14. *Walton v. Birch*, 10 La. Ann. 100; *Beck v. Brady*, 7 La. Ann. 124.

15. *O'Connell v. Cruise*, 1 Handy (Ohio), 163, 12 Ohio Dec. 81.

16. *LaCrosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. 153.

affords no presumption of law against the *bona fides* of the transaction;¹⁷ but the fact of relationship may properly be considered, in connection with other evidence tending to impeach the transaction, in determining whether a conveyance was fraudulent.¹⁸ The fact that the parties to a conveyance are brothers does not, of and in itself, cast suspicion on the transaction, or create such a *prima facie* presumption against its validity as

17. *N. Y.*—DuBois v. Barker, 4 Hun, 80, 6 Thomp. & C. 349.

Ala.—Morrow v. Campbell, 118 Ala. 330, 24 So. 852, the kinship of parties does not raise any presumption of fraud, or require any higher degree of proof of the *bona fides* of the transaction than would be sufficient to reasonably satisfy the minds of the jury if the relationship did not exist; Smith v. Collins, 94 Ala. 394, 10 So. 334; Montgomery's Ex'rs v. Kirksey, 26 Ala. 172.

D. C.—Clark v. Krause, 2 Mackey, 559.

Ill.—Nelson v. Smith, 28 Ill. 495.

Ind.—Basye v. Daniel, 1 Ind. 378.

Iowa.—Conry v. Benedict (1898), 76 N. W. 840; Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159.

La.—Shadburne v. Amonette, 7 La. Am. 89; Maurin v. Rouquer, 19 La. 594; Beale v. Delancy, 6 Mart. N. S. 641, 17 Am. Dec. 199; Ham v. Herri-man, 1 Mart. N. S. 535; St. Avid v. Weimprender's Syndics, 9 Mart. 648.

Neb.—Lininger v. Herron, 18 Neb. 450, 25 N. W. 578.

N. J.—Demarest v. Terhune, 18 N. J. Eq. 45.

Pa.—Reehling v. Byers, 94 Pa. St. 316; Newton v. Shaffer, 6 Kulp. 357.

Tenn.—Sporrer v. Eifler, 48 Tenn. 633; Bumpas v. Dotson, 26 Tenn. 310, 46 Am. Dec. 81.

Wis.—Bleiler v. Moore, 88 Wis.

438, 60 N. W. 792; Sterling v. Ripley, 3 Chandl. 166, 3 Pin. 155.

Contra.—*Ala.*—Gordon v. McIlwain, 82 Ala. 247, 2 So. 671; Marshall v. Croom, 52 Ala. 554.

Neb.—Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731.

Tex.—Reynolds v. Lansford, 16 Tex. 286.

18. *U. S.*—Whetmore v. Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380.

Ill.—Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70.

Iowa.—Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159, although it is competent to show the relationship of the parties to an alleged fraudulent conveyance, such relationship will not of itself warrant a finding of fraud without evidence that the grantee knew that the grantor intended by the conveyance to defraud his creditors.

Kan.—Whitson v. Griffis, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546; Burton v. Boyd, 7 Kan. 17.

La.—Cadiere v. Gaidry, 42 La. Ann. 169, 7 So. 232.

Or.—Goodale v. Wheeler, 41 Or. 190, 68 Pac. 753, on account of the relationship it is incumbent on the grantee to establish the good faith of the transaction.

Tex.—Steinam v. Gahwiler (Civ. App. 1895), 30 S. W. 472.

Wis.—Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758.

will require a court to hold it to be invalid, without proof of fraud on the part of the grantor participated in by the grantee.¹⁹ Although transactions between members of a family are closely scrutinized, the fact that a purchaser of a debtor's property was his brother-in-law was not of itself sufficient to establish fraud in the conveyance as against creditors.²⁰ The relation of mother-in-law and son-in-law between the vendor and purchaser of land is not of itself a badge of fraud, and would not alone shift the burden of proof.²¹ The fact that a mortgagee of goods is the father-in-law of the mortgagor raises no presumption that the mortgage was given with intent to defraud the mortgagor's creditors.²² A voluntary conveyance from a brother to a sister is not fraudulent as to a subsequent creditor of the grantor, unless actual fraud is shown.²³ In some jurisdictions it is held that transactions between father and child, husband and wife, brother and sister, and others connected by blood or marriage, between whom there exists a natural and strong motive to protect each other at the expense of creditors, will be more closely scrutinized than if the transactions were between strangers,²⁴ and that

19. *U. S.*—*Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157.

Ala.—*Shealy v. Edwards*, 75 Ala. 411.

Ill.—*Duffield v. Delancey*, 36 Ill. 258.

N. C.—*City Nat. Bank v. Bridgers*, 114 N. C. 383, 19 S. E. 666.

S. D.—*Lane v. Starr*, 1 S. D. 107, 45 N. W. 212. There is nothing in the relation of brothers to render fraudulent a judgment by confession on a just debt by one in favor of another. *Kitchen v. McCloskey*, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811.

20. *Thompson v. Zuckmayer* (Iowa, 1903), 94 N. W. 476; *Fluegel v. Henschel*, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

21. *Tompkins v. Nichols*, 53 Ala. 197.

22. *Stevens v. Breen*, 75 Wis. 595, 44 N. W. 645.

23. *Hunt v. Nance*, 28 Ky. L. Rep. 1188, 92 S. W. 6. See *Bruffman v. Glover*, 35 S. C. 431, 14 S. E. 935; *Copis v. Middleton*, 2 Madd. 410, 17 Rev. Rep. 226, 56 Eng. Reprint, 386, as to conveyances to a nephew.

24. *Marshall v. Croom*, 60 Ala. 121; *Gregory v. Gray*, 88 Ga. 172, 14 S. E. 187, transfer to son-in-law; *Mellier v. Bartlett*, 106 Mo. 381, 17 S. W. 295; *Penn v. Trompen* (Neb. 1904), 100 N. W. 312; *Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527; *Schott v. Machamer*, 54 Neb. 514, 74 N. W. 854; *Farrington v. Stone*, 35 Neb. 456, 53 N. W. 389; *Marcus v. Leake*, 4 Neb. (Unoff.)

they may be shown to be fraudulent by less proof than in cases where such relationship does not exist; and the party claiming the benefit of such a transaction is held to a fuller and stricter proof of its justice, and clearer and more convincing proof of the fairness of the transaction, after it is shown to be *prima facie* fraudulent, than would be required where the transaction was between persons not related.²⁵ On the contrary other cases hold that business dealings between near relatives are to be treated as are the transactions of other people, and no clearer proof of the *bona fides* of the parties is required than in other cases, and if the *bona fides* of the transaction is attacked the fraud alleged must be proved.²⁶ Where the evidence shows that the grantee paid a full and adequate price or about the fair cash value of the property, the transaction will not be held fraudulent merely because he was related to the grantor.²⁷ It is only where a conveyance is voluntary or for an inadequate

354, 94 N. W. 100, a brother-in-law is a relative within the rule that transactions between relatives should be closely scrutinized; *Kundson v. Parker*, 3 Neb. (Unoff.) 481, 91 N. W. 350; *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804.

25. *Reeves v. Skipper*, 95 Ala. 407, 10 So. 309, transfer between brothers; *Lehman v. Greenhut*, 88 Ala. 478, 7 So. 299; *Hubbard v. Allen*, 59 Ala. 283; *Martin v. Dungan*, 156 Ill. 274, 41 N. E. 43, transfer between brothers; *Braffman v. Glover*, 35 S. C. 431, 14 S. E. 935, transfer to a nephew; *Farmers' Transp. Co. v. Swaney*, 48 W. Va. 272, 37 S. E. 592, the relationship, connected with other circumstances, may strengthen the presumption of fraud; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838, transfer to a nephew; *Burt v. Timmons*, 29 W.

Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

26. *Curry v. Lloyd*, 22 Fed. 258; *Clewis v. Malon*, 119 Ala. 312, 24 So. 767; *Morrow v. Campbell*, 118 Ala. 330, 24 So. 852; *Goetter v. Norman*, 107 Ala. 585, 19 So. 56; *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201; *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538; *Reehling v. Byers*, 94 Pa. St. 316. See also Evidence as affected by relationship of parties, chap. XVII, §§ 4, 49, *infra*.

27. *Ala.*—*Russell v. Davis*, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56, transfer to brother; *Bradley v. Ragsdale*, 64 Ala. 558; *Young v. Dumas*, 39 Ala. 60; *Troy v. Smith*, 33 Ala. 469, mortgage.

Del.—*Hagany v. Herbert*, 3 Houst. 628, sale of household goods to father-in-law.

Fla.—*Wilson v. Lott*, 5 Fla. 305, sale of entire property to mother-in-law.

consideration that inquiry into the relationship of the parties becomes material.²⁸ But a conveyance will be looked upon with suspicion where the grantor is in failing circumstances and the conveyance is of all his property.²⁹ And where the conveyance is made when the grantor is insolvent, for a consideration which is fictitious, the sale will be held to be simulated and the conveyance to be fraudulent.³⁰ A conveyance will be held to be fraudulent where it is made to a relative by a debtor in failing circumstances, upon an inadequate consideration, and the conveyance is attended with circumstances of unusual caution or other suspicious circumstances,³¹ such as the fact that the transfer is to a poor relation, who is without means or is not shown to be able to pay therefor,³² or in consideration of the payment of a large and suspicious debt to himself,³³ the fact that the

Ga.—*Cowart v. Epstein*, 101 *Ga.* 1, 29 *S. E.* 370, transfer to brother.

Ill.—*Schroeder v. Walsh*, 120 *Ill.* 403, 11 *N. E.* 70; *Waterman v. Donaldson*, 43 *Ill.* 29, transfer to uncle; *Wightman v. Hart*, 37 *Ill.* 123, transfer to nephew.

Iowa.—*Thompson v. Zuckmayer* (*Iowa*, 1903), 94 *N. W.* 476, transfer to brother-in-law; *Austin v. Bowman*, 81 *Iowa*, 277, 46 *N. W.* 1111, transfer to father-in-law; *Adams v. Ryan*, 61 *Iowa*, 733, 17 *N. W.* 159.

Ky.—*Mills v. Hunt*, 12 *Ky. L. Rep.* 866, 15 *S. W.* 518, transaction between brothers.

Miss.—*Verner v. Verner*, 64 *Miss.* 184, 1 *So.* 52, transfer to brother.

Mo.—*Martin v. Fox*, 40 *Mo. App.* 664.

Mont.—*Noyes v. Ross*, 23 *Mont.* 425, 59 *Pac.* 367, 75 *Am. St. Rep.* 543, 47 *L. R. A.* 400, mortgage.

Neb.—*McEvony v. McCann*, 31 *Neb.* 597, 48 *N. W.* 389, sale to brother.

Tenn.—*Ocoee Bank v. Nelson*, 41

Tenn. 186, the fact that the property was sold to a relation by affinity, though in general suspicious, will not render the sale void, if made *bona fide* and for a fair value.

28. *English v. Porter*, 109 *Ill.* 285.

29. *Borland v. Mayo*, 8 *Ala.* 104.

30. *Martin v. Kennedy*, 83 *Ky.* 335; *Friedlander v. Brooks*, 35 *La. Am.* 741; *Birdsale v. Lakey*, 6 *La. Ann.* 646.

31. *Burgess v. Simonson*, 45 *N. Y.* 225; *Sands v. Codwise*, 4 *Johns. (N. Y.)* 536, 4 *Am. Dec.* 305; *Barrow v. Bailey*, 5 *Fla.* 9; *Milner v. Davis*, 65 *Iowa*, 265, 21 *N. W.* 599; *Cox v. Cox*, 39 *Kan.* 121, 17 *Pac.* 847.

32. *Pickett v. Pipkin*, 64 *Ala.* 520; *Schumacher v. Bell*, 164 *Ill.* 181, 45 *N. E.* 428, *aff'd* 61 *Ill. App.* 644; *Gamet v. Simmons*, 103 *Iowa*, 163, 72 *N. W.* 444; *McDonald v. Farrell*, 60 *Iowa*, 335, 14 *N. W.* 318; *Steinam v. Gahwiler* (*Tex. Civ. App.* 1895), 30 *S. W.* 470.

33. *Robinson v. Frankel*, 85 *Tenn.* 475, 3 *S. W.* 652.

sale is made on a long or unusual credit,³⁴ or for the purchaser's unsecured notes,³⁵ the fact that the purchase is made without any reasonably apparent motive,³⁶ the fact that the parties cannot explain how the indebtedness arose and how the amount claimed is made up,³⁷ or the fact that the seller takes an active interest in the property and business after the transfer,³⁸ or retains possession of real estate without payment of rent.³⁹ Attachment, obtained by relatives of an insolvent, will be set aside as to other creditors, on proof of acts of collusion between the relatives and insolvent to deceive other creditors, and on the inability of the relatives to satisfactorily explain their claims.⁴⁰

§ 4. **Transactions between husband and wife.**—Fraud is one of the broadest issues known to the law, for it can seldom be proved by direct evidence, but is dependent upon circumstances which, separately considered, may be quite immaterial, but when combined are not only material but have great persuasive force. The marriage relation affords such peculiar opportunities for practicing fraud upon creditors, and fraud is so easily practiced and concealed under cover of the marriage relation, that equity requires that the courts should scrutinize with the utmost care all conveyances and business transactions between husband and wife, alleged to be fraudulent as against creditors and which injuriously affect the rights of creditors.⁴¹ It is, therefore, held

34. *Thames v. Rembert's Adm'r*, 63 Ala. 561; *Cowling v. Estes*, 15 Ill. App. 255; *Bibb v. Baker's Adm'r*, 56 Ky. 292.

35. *Helms v. Green*, 105 N. C. 251, 11 S. E. 470, 18 Am. St. Rep. 893; *Robinson v. Frankel*, 85 Tenn. 475, 3 S. W. 652.

36. *Bibb v. Baker's Adm'r*, 56 Ky. 292.

37. *Morris v. Lindauer*, 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510; *Marks v. Crow*, 14 Or. 382, 13 Pac. 55; *Catchings v. Harcrow*, 48 Ark. 20, 49 Ark. 20, 3 S. W. 884.

38. *American Nat. Bank v. Viterbo*, 46 La. Ann. 1313, 16 So. 199.

39. *Johnson v. Harrison*, 6 Ky. L. Rep. 592.

40. *Rice v. Less*, 105 Ala. 298, 16 So. 917.

41. *White v. Benjamin*, 150 N. Y. 258; *Bennett v. Boshold*, 123 Ill. App. 311; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606, they should be closely scrutinized to see that they are honest, that the consideration is adequate, and that it is paid by the wife out of her separate estate.

as a general rule that transfers of property from husband to wife, by reason of which creditors are prevented from collecting their claims, will be closely scrutinized to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors, and must be shown to have been made in good faith and upon adequate consideration.⁴² A conveyance from a hus-

42. *N. Y.*—*Allee v. Slane*, 26 App. Div. 455, 50 N. Y. Supp. 55, but where the plaintiff fails to establish that he was creditor when the transfer was made, or that the debtor was insolvent at the time of the delivery of the deed, no presumption of fraud in the conveyance arises from the relationship between the grantee and the grantor.

U. S.—*Hinchman v. Parlin, etc., Co.*, 74 Fed. 698, 21 C. C. A. 273; *Graves v. Davenport*, 50 Fed. 881.

Ala.—*McTeers v. Perkins*, 106 Ala. 411, 17 So. 547.

Ark.—*Hershy v. Latham*, 46 Ark. 542.

Conn.—*Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804; *Fishel v. Matta*, 76 Conn. 197, 56 Atl. 558; *Throckmorton v. Chapman*, 65 Conn. 441, 32 Atl. 930; *Gilligan v. Lord*, 51 Conn. 562.

Ga.—*Reese v. Shell*, 95 Ga. 749, 22 S. E. 580; *Skellie v. James*, 81 Ga. 419, 8 S. E. 607; *Kelly v. Simmons*, 73 Ga. 716; *Rountree v. Lathrop*, 69 Ga. 757; *Shorter v. Methvin*, 52 Ga. 225.

Ill.—*Viotor v. Swisky*, 200 Ill. 257, 65 N. E. 625; *Dillman v. Nadelhoffer*, 162 Ill. 625, 45 N. E. 680; *Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341; *Frank v. King*, 121 Ill. 250, 12 N. E. 720; *Gibson v. Kimmitt*, 113 Ill. App. 611.

Kan.—*Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606.

Ky.—*Gross v. Eddinger*, 85 Ky. 168, 3 S. W. 1, 8 Ky. L. Rep. 829.

La.—*Brown v. Ferguson*, 4 La. 257.

Me.—*Trefethen v. Lynam*, 90 Me. 376, 38 Atl. 335, 60 Am. St. Rep. 271, 38 L. R. A. 190; *Robinson v. Clark*, 76 Me. 493.

Md.—*Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64.

Miss.—*Wynne v. Mason*, 72 Miss. 424, 18 So. 422.

Mont.—*Shepherd v. First Nat. Bank*, 16 Mont. 24, 40 Pac. 67; *Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063.

Neb.—*First Nat. Bank v. Bartlett*, 8 Neb. 319, 1 N. W. 199; *Aultman v. Obermeyer*, 6 Neb. 260.

Pa.—*Sutton v. Guthrie*, 188 Pa. St. 359, 41 Atl. 528; *Billington v. Sweeting*, 172 Pa. St. 161, 33 Atl. 543; *Reese v. Reese*, 157 Pa. St. 200, 27 Atl. 703; *Wilson v. Silkman*, 97 Pa. St. 509.

S. C.—*Charleston Bank v. Dowling*, 52 S. C. 345, 29 S. E. 788.

S. D.—*Watt v. Morrow* (1905), 103 N. W. 45, a court of equity will not regard of very great importance the mere fact that a deed of land, alleged to have been purchased by the judgment debtor and conveyed to his wife in fraud of creditors, was taken

band to his wife will not be sustained, in equity, when it interferes with the rights of creditors.⁴³ Transfers between husband and wife will be looked on with suspicion, but a transfer of property by a debtor to his wife, if on sufficient consideration, will not be declared fraudulent because of a suspicion arising from the relationship of the parties.⁴⁴ The existence of the confidential relationship between the parties may be considered, however, by the jury on the issue of fraud.⁴⁵ As against a pre-existing creditor, it has been held that a wife who takes a conveyance from her husband must show an adequate consideration, and that by clearer and fuller proof than is required in transactions between strangers.⁴⁶ In some jurisdictions a conveyance

in the name of the wife, but will look at the circumstances surrounding the transaction, and determine therefrom the real nature of such transaction; *Williams v. Harris*, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Tex.—*Flanagan v. Oberthier*, 50 Tex. 379.

Va.—*Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

Wis.—*Hoxie v. Price*, 31 Wis. 82.

43. *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

44. *N. Y.*—*Childs v. Connor*, 38 N. Y. Super. Ct. 471, 48 How. Pr. 517, where the evidence fails to disclose any motive to induce a defendant to seek to defraud his creditors by the transfer of property to his wife, and there is an absence of proof that he was insolvent or unable to pay all his debts at the time of the conveyance by him, such conveyance will not be vacated.

Ala.—*Copeland v. Kehoe*, 57 Ala. 246.

Me.—*Grant v. Ward*, 64 Me. 239.

Mich.—*Steel v. De May*, 102 Mich. 274, 60 N. W. 684; *Buhl v. Peck*, 70 Mich. 44, 37 N. W. 876.

Minn.—*Teller v. Bishop*, 8 Minn. 226.

Miss.—*Kaufman v. Whitney*, 50 Miss. 103.

Neb.—*Wanser v. Lucas*, 44 Neb. 759, 62 N. W. 1108; *Hill v. Fouse*, 32 Neb. 637, 49 N. W. 760; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731.

W. Va.—*First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

Wis.—*Allen v. Perry*, 56 Wis. 178, 14 N. W. 3.

Increase in value of property after purchase.—The fact that a married woman who borrowed five hundred dollars, with which she purchased an interest in a mine from her husband, afterwards sold it for ten thousand dollars, does not stamp the transaction as fraudulent, so far as the creditors of her husband are concerned. *Sears v. Robinson*, 61 Iowa, 745, 16 N. W. 66.

45. *Sherman v. Hogland*, 73 Ind. 472.

46. *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 So. 149; *Claffin v. Ambrose*, 37 Fla. 78, 19 So. 628; *Livey v. Winton*, 39 W. Va. 554, 4 S. E. 451. *Contra.*—*Rachofsky v. Benson*, 19 Colo. App. 173, 74 Pac. 655.

by an insolvent debtor to his wife, whereby other creditors are prevented from enforcing payment of their claims, is presumptively fraudulent as to creditors, and unless the presumption of fraud be overcome by satisfactory affirmative proof it will not be sustained.⁴⁷ Where a husband occupies his wife's house as a home for the family, he may pay rent to her, and fraud is not necessarily inferred from the fact that the business transactions between them are conducted on more liberal terms than are usual between strangers.⁴⁸ Where a husband, being insolvent, voluntarily expends money in paying the current expenses of taxes, insurance, and repairs on the family residence belonging to his wife, instead of paying rent, he is simply fulfilling the duty which the law imposes upon him, and such payments are not made in fraud of creditors.⁴⁹ As we have shown in previous chapters, the rules are well established that where the transaction is unaffected by unfairness or fraud, a husband can convey property to his wife as a gift where he retains other property amply sufficient to pay his debts,⁵⁰ and that he may convey property to

47. *Ala.*—Kelley v. Connell, 110 Ala. 543, 18 So. 9; Lammons v. Allen, 88 Ala. 417, 6 So. 915; Bangs v. Edwards, 88 Ala. 382, 6 So. 764; Booker v. Waller, 81 Ala. 549, 8 So. 225.

Ky.—Long v. Deposit Bank, 28 Ky. L. Rep. 913, 90 S. W. 961, where the husband was held out as owner of the land, the conveyance was presumptively fraudulent as to creditors who extended credit on the faith of his ownership.

La.—Kirkpatrick v. Finney, 30 La. Ann. 223.

Mo.—Stivers v. Horne, 62 Mo. 473.

Neb.—David Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Glass v. Zutavern, 43 Neb. 334, 61 N. W. 579, 47 Am. St. Rep. 763; Hill v. Fouse, 32 Neb. 637, 49 N. W. 760; First Nat. Bank v. Bartlett, 8

Neb. 319, 1 N. W. 199; Lynch v. Englehardt-Winning-Davidson Mercantile Co., 1 Neb. (Unoff.) 528, 96 N. W. 524.

S. D.—Williams v. Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Va.—Hunters v. Waite, 3 Gratt. 46.

W. Va.—Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Core v. Cunningham, 27 W. Va. 206; Maxwell v. Hanshow, 24 W. Va. 405. *Contra.*—Droop v. Ridenour, 11 App. Cas. (D. C.) 224; Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157.

48. Frost v. Steele, 46 Minn. 1, 48 N. W. 413.

49. Brundage v. Munger, 54 App. Div. (N. Y.) 549, 66 N. Y. Supp. 1014.

50. Indebtedness or insolvency of

his wife for a valuable consideration, even though he be insolvent, where there is an adequate consideration paid from the separate estate of the wife,⁵¹ or where the consideration is a valid debt owing by the husband to the wife or money advanced by the wife to the husband, and the value of the property transferred is not materially in excess of the debt or advancement which constitutes the consideration.⁵² A husband may pay his wife any indebtedness he owes her, providing it is done without any design to cheat or defraud his other creditors.⁵³

§ 5. **Purchase of husband's property at private or public sale.**—The purchase by a wife of property belonging to her husband at private or public sale does not of itself make the sale fraudulent as to the husband's creditors, where it appears that she had separate property,⁵⁴ or paid for the property out of her separate estate,⁵⁵ or that the purchase was on her own credit,⁵⁶

grantor, chap. VII, *supra*; Adequacy of consideration, chap. VIII, § 29, *supra*. Thompson v. Mills, 39 Ind. 528; Sims v. Ricketts, 35 Ind. 181.

51. Transactions between husband and wife, nature, adequacy and sufficiency of consideration, chap. VIII, § 38, *supra*.

52. Transactions between husband and wife, pre-existing liability, chap. VIII, § 46, *supra*.

53. Tanner v. Eckhardt, 107 App. Div. (N. Y.) 79, 94 N. Y. Supp. 1013.

54. Belcher v. Black, 68 Ga. 93, purchase at tax sale.

Contra.—Herrin v. Henry (Ark. 1905), 87 S. W. 430, where an insolvent husband's land goes to tax sale and the wife purchases, the purchase will be treated, in favor of his creditors, as a redemption.

55. U. S.—Carite v. Trotot, 105 U. S. 751, 26 L. Ed. 1223.

Ky.—Howard v. Tenney, 87 Ky. 52, 10 Ky. L. Rep. 94, 7 S. W. 547, a tax deed.

Mo.—Hibbard v. Heckart, 88 Mo. App. 544.

N. C.—Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285.

Pa.—Walter v. Jones, 148 Pa. St. 589, 24 Atl. 119, where the wife bought the goods from a creditor of the husband, who purchased them at execution sale, for the purpose of engaging in business herself; Keeney v. Good, 21 Pa. St. 349, a purchase by an insolvent husband in his wife's name of property formerly his own from his assignee's grantee, in order to protect her from his creditors, must be clearly proved to have been an actual purchase out of her own funds.

56. Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285; Bollinger v. Gallagher, 170 Pa. St. 84, 32 Atl. 569,

though she was not shown to have any separate estate prior to the purchase by her,⁵⁷ where there is no proof of actual fraud. But a simulated execution sale of a husband's property to his wife, made for the purpose of strengthening her previous fraudulent claim or title, there being in fact no levy, or possession or control taken of the property, by the sheriff, will vest no title in the wife as against the husband's creditors.⁵⁸ And if, at a sheriff's sale, the wife purchases the property with her own and her husband's money, for the purpose of defrauding his creditors, this fraudulent intent being proved, the creditors will take the whole, and she lose what she has put in of her own.⁵⁹ Where a wife buys her husband's land at sheriff's sale in good faith, and with her own funds, taking title subject to existing mortgages, if the husband subsequently pays such mortgages or some of them, his judgment creditors may levy on and sell his interest in the land subject to the wife's prior lien for the amount paid by her.⁶⁰

§ 6. **Conveyances to wife from third persons.**—It is no fraud upon creditors for a third person to convey property to the debtor's wife free from his control, where he pays no part of the consideration, and assumes no obligation on account of it.⁶¹ To constitute the transaction fraudulent as to creditors the consideration must have come in whole or part, from the husband, and where it did not, but came from the wife's separate estate, or by way of advancement from the wife's parents, or the conveyance from such third person was voluntary, the property will be held by the wife free and clear of all claims of the creditors of the husband, even though the purpose was to protect the

37 Wkly. Notes Cas. 8. if it was the wife's credit, and not her husband's, which induced other persons to become sureties on a note signed by herself and her husband and given in payment, she acquired good title, as against her husband's creditor; *Cheatham v. Thornton*, 79 Tenn. 295.

57. *Frankenthal v. Gilbert*, 34 Fed. 5.

58. *Cox v. Miller*, 54 Tex. 16.

59. *Ewing v. Gray*, 12 Ind. 64.

60. *Delo v. Johnson*, 110 Mo. App. 642, 85 S. W. 109.

61. *Clark v. Krause*, 6 Mackey (D. C.), 108.

property for the wife from the husband's creditors, and it cannot be subjected to claims of the creditors of the husband.⁶² This rule applies where a third person conveys to the wife land which he had agreed to convey to the husband, if such agreement was not enforceable because of want of consideration, as where a father agreed to advance land to his son and the son agreed to claim no further interest in the father's estate at the latter's death.⁶³ The rule is also applicable where a creditor, to whom land has been conveyed by the debtor as security for a debt, afterwards conveys it as a gift to the wife of the debtor.⁶⁴ The property of a wife cannot be subjected to the payment of her husband's debts unless it clearly appears that the property

62. *Ala.*—Paulk v. Wolfe, 34 Ala. 541.

Ill.—May v. Jenkins, 15 Ill. 101.

Ind.—Stone v. Brown, 116 Ind. 78, 18 N. E. 392.

Iowa.—Pringey v. Warrell, 73 Iowa, 561, 35 N. W. 632.

Minn.—De Lancey v. Finnegan, 86 Minn. 255, 90 N. W. 387.

Miss.—Fulton v. Woodman, 54 Miss. 158.

Mo.—Bay v. Sullivan, 30 Mo. 191, voluntary conveyance.

Neb.—Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019, in order to maintain a creditor's suit against the wife to set aside a conveyance to her by a third person plaintiff must allege and prove that the relation of debtor and creditor existed between himself and the husband when the conveyance was executed, or that it was executed with the expectation that the husband would become indebted to the plaintiff, and to prevent the collection of such debt when contracted; May v. Hoover, 48 Neb. 199, 66 N. W. 1134; Stevenson v. Craig, 12 Neb. 464, 12 N. W. 1.

Pa.—Winch v. James, 68 Pa. St.

297, a creditor, after buying his debtor's property at an open, public and *bona fide* sale, may lawfully give it to the debtor's wife; Bancord v. Kuhn, 36 Pa. St. 383, the surrender of a deed from a father to his daughter and her husband, for the purpose of having a new deed to the wife alone substituted in its stead, with the intention of securing to the wife that which was originally intended as a gift to her, being in furtherance of the objects of the Act of 1848, cannot be deemed fraudulent, under the statute of Elizabeth, as against the husband's creditors.

63. Powell v. Burk's Heirs, 7 Ky. L. Rep. 220. Where a deed of gift by a father to a minor son was never delivered or recorded, the property may afterwards be conveyed to the son's wife at his request, since no title passes before the delivery of the deed. Stow v. Miller, 16 Iowa, 460.

64. Popfinger v. Yutte, 102 N. Y. 38, 6 N. E. 259, *rev'g* 40 N. Y. Super. Ct. 312; Blossom v. Negus, 182 Mass. 515, 65 N. E. 846, and where, as a part of the same transaction, he cancels the indebtedness of the husband.

actually belonged to the husband and was placed in the wife's name for the express purpose of preventing its being reached by the husband's creditors.⁶⁵ A conveyance of realty to the wife of a debtor by a third party, at the instance of the husband, who had paid the purchase money, is void as against the latter's existing creditors, and lands purchased with funds of the husband in his wife's name, or paid for, wholly or in part, with his money, may be subjected in equity to levy in satisfaction of his debts, contracted before the property was placed in the wife's name.⁶⁶ But real estate purchased by a husband, the title whereof is taken in the name of the wife, cannot be subjected to the claims of existing creditors of the husband, where the husband at the time of the purchase is substantially free from debt and solvent,⁶⁷ or where the consideration was savings of both husband and wife and the property was bought for a homestead.⁶⁸

65. *Clark v. Else* (S. D.), 110 N. W. 88. Where the owner of a stock of goods, two or three days before his assignment for the benefit of creditors, sold the stock at a grossly inadequate consideration to a third person, taking notes for the price, and turning them over to the assignee, but retained possession of and sold goods from the stock, and with the proceeds repurchased it for his wife, the transaction was fraudulent as to creditors. *Bishop v. John H. Hibben Dry Goods Co.* (Ky. 1907), 99 S. W. 644.

66. *Ala.*—*Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107, 31 So. 524; *Watts v. Burgess*, 131 Ala. 333, 30 So. 868.

Ark.—*Davis v. Yonge* (1905), 85 S. W. 90, the wife cannot procure the cancellation of an execution sale thereof on a judgment against the husband without affirmatively show-

ing that the husband was solvent, and able to make the gift.

D. C.—*Turner v. Gottwals*, 15 App. Cas. 43, the interest of the husband may be subjected to the claims of his creditors.

Fla.—*Florida L. & T. Co. v. Crabb* (1903), 33 So. 523.

Ky.—*Robinson v. Woolstein*, 22 Ky. L. Rep. 883, 58 S. W. 706.

Mich.—*Adams v. Bruske*, 135 Mich. 339, 97 N. W. 766.

Mo.—*W. F. Johnson & Co. v. Christie*, 79 Mo. App. 46, 2 Mo. App. Rep. 322, where stock in a corporation was given to the wife by agreement with the husband.

Neb.—*Omaha Brewing Assoc. v. Zeller*, 4 Neb. (unoff.) 198, 93 N. W. 762.

67. *Davis v. Yonge* (Ark. 1905), 85 S. W. 90; *Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850.

68. *Scott v. Holman*, 117 Wis. 206, 94 N. W. 30.

§ 7. **Giving false credit to husband.**—Suffering the separate property of a married woman to remain in the possession of the husband is not necessarily fraudulent as to creditors, if the husband's possession is not inconsistent with the trust, and the question of fraud should be left to the jury.⁶⁹ Fraud is not necessarily indicated by the fact that the wife suffered her husband to manage her property without interference on her part, and that he mainly appeared in the negotiations necessary in the various matters affecting her property.⁷⁰ When a wife lends money to her husband, which he uses in his business, she need not notify persons with whom he deals that he is trading with her capital, nor take any writing showing the state of her account with him, and if, while solvent, he buys, with her money, land which is conveyed to her, it cannot, when he becomes insolvent, be subjected to pay his debts.⁷¹ But a wife cannot allow her husband to use and appropriate her property as his own for years, and incorporate a part of his own means into it, and then, upon a conveyance of the whole from her husband, make valid claim to it as against his creditors.⁷² A conveyance made by a husband to his wife in order to defraud his creditors will be set aside at their suit, though the land was originally bought with the wife's money, where she has allowed the title to stand in her husband's name, for the purpose of giving him credit.⁷³ And where a wife permits her husband to take title to her lands, or allows the title to lands paid for by her to be taken in the name of her husband, and he holds himself out to the world as the owner of them, and contracts debts upon the credit of such ownership, the rights and equity of his creditors, who rely on such apparent ownership and give him credit in the belief that he is the owner, are superior to the rights of the wife, and they

69. *Merritt v. Lyon*, 3 Barb. (N. Y.) 110.

70. *Hensley v. Hensley*, 65 Ill. App. 195; *Emerson v. Hewins*, 64 Me. 297.

71. *Buhl v. Peck*, 70 Mich. 44, 37 N. W. 876.

72. *Moyer v. Adams*, 2 Fed. 182.

73. *Lowentrout v. Campbell*, 130 Ill. 503, 22 N. E. 744, *aff'g* 31 Ill. App. 114; *Stillwell v. Stillwell* (N. J. Ch.), 18 Atl. 679.

may subject the lands or the proceeds thereof to the payment of their debts, even though the property has been subsequently conveyed to the wife.⁷⁴ But the rule does not apply where the wife did not know that he was doing business on credit and supposed that his own means were ample to carry on his business.⁷⁵ Where a conveyance is made to husband and wife, though the wife furnishes the consideration, both become seized of the entirety, and where the wife acquiesces in her husband's seizin until he is prosecuted for a debt, presumably contracted on the

74. Ill.—Maddox v. Epler, 48 Ill. App. 265.

Ind.—Minnich v. Shaffer, 135 Ind. 634, 34 N. E. 987.

Ky.—Meade v. Stairs, 88 Ky. 66, 10 S. W. 272, 10 Ky. L. Rep. 702.

Miss.—Myers v. Little, 60 Miss. 203, where the statute provided that such a conveyance shall be void as against creditors "who contracted or gave credit in consequence of the possession of such property."

Neb.—Swartz v. McClelland, 31 Neb. 646, 48 N. W. 461.

N. J.—City Nat. Bank v. Hamilton, 34 N. J. Eq. 158.

Wis.—Hopkins v. Joyce, 78 Wis. 443, 47 N. W. 722.

Where credit is not given on the faith of the supposed title in the husband, a conveyance to the wife cannot be successfully attacked. First Nat. Bank v. Peterson, 3 Neb. (Unoff.) 102, 91 N. W. 195. See also Hill v. Meinhard, 39 Fla. 111, 21 So. 805.

Where deed was taken in name of husband and wife jointly, although the property was purchased with the wife's separate estate, a conveyance by the husband and wife to a third person, and by the latter back to the wife, was fraudulent as against a judgment creditor whose

debt arose before the conveyance. Rosenblath v. Buttlar, 7 N. J. L. J. 143.

A contract in good faith between husband and wife, involving the use by him of her separate estate, not with the intent to hinder, delay or defraud her husband's creditors, will not be deemed to be fraudulent from the fact that subsequently the husband becomes insolvent, though, where the effect of the contract is to debar the husband's creditors from subjecting his property to the payment of their claims, proof of good faith will be required. Hill v. Fouse, 32 Neb. 637, 49 N. W. 760.

Repeal of statute.—Section 2499, Revision 1860, providing that if personal property of the wife is left under the control of the husband, it will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him, having been repealed by the Code of 1873, has no application to persons who became creditors of the husband, after the adoption of the later Code. Hedge v. Glenney, 75 Iowa, 513, 39 N. W. 818.

75. Alkire Grocery Co. v. Ballenger, 137 Mo. 369, 38 S. W. 911.

faith of his seizin, the property is liable for the debt.⁷⁶ A voluntary conveyance by a husband to his wife of all his property is in fraud of his creditors, where he continues to enjoy the property as before, and continues to obtain money to a large amount on the strength of his ownership.⁷⁷ Where real estate purchased with the wife's money is placed in the name of her husband, by him managed and controlled, and is, prior to the rendition of a judgment against him, conveyed to his wife, such conveyance will stand, as against a judgment creditor, unless special facts appear, such as actual fraud on the part of the husband or the wife, the giving of credit on the faith of the husband's record ownership, or the creditors being in some way misled by reason of such record ownership.⁷⁸ A conveyance by a husband, after becoming financially involved, to his wife of real property paid for by the earnings of both, but the legal title of which had been in his name for many years, operates as a legal fraud against the creditors of the husband who are prejudiced thereby, however innocent the motives of the parties may have been.⁷⁹ The same rule applies where, although the record title is in the wife, she permits the husband to appear to the outside world as the owner thereof, and he thereby obtains credit, and such subsequent creditors are entitled to have the lands subjected to the lien of their judgment.⁸⁰ Where a husband purchases land with his wife's money, and by mistake the conveyance was in his name, but the wife was notified, and allowed the husband to manage the estate as though it were his own, a subsequent conveyance to the wife was void as to a creditor who made a loan to the husband on the faith of his ownership.⁸¹

76. *Ward v. Krumm*, 54 How. Pr. (N. Y.) 95.

77. *Lander v. Ziehr*, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456.

78. *Torrey v. Dickinson*, 213 Ill. 36, 72 N. E. 703, *rev'd* 111 Ill. App. 524.

79. *Maple Valley Twp. v. Foley*, 113 Mich. 622, 4 Det. C. N. 424, 71 N.

W. 1086, *citing* *Iseminger v. Criswell* (Iowa), 67 N. W. 289; *Carbiener v. Montgomery* (Iowa), 66 N. W. 900.

80. *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211.

81. *Sears v. Davis*, 40 Or. 236, 66 Pac. 913. See also *Talbott v. Gillespie*, 21 Ky. L. Rep. 1065, 53 S. W. 1047.

Where land belonging to the wife's estate was conveyed to the husband and held by him and treated as his own, and, in making statements to commercial agencies, he included the land as part of his assets, a subsequent conveyance to the wife was fraudulent as to creditors.⁸²

§ 8. **Transactions between parent and child.**—Transactions between relatives are subjected to rigid scrutiny. Courts scrutinize with the utmost care business transactions between husband and wife alleged to be fraudulent as against creditors, because fraud is so easily practiced and concealed under cover of the marriage relation, and the same rule applies, though, possibly, in a less degree, to a transfer from a parent to a child when they are both members of the same family.⁸³ As a general rule the relationship of the parties to a transaction as parent and child is not regarded in law as a badge of fraud, or necessarily indicative of fraud, or sufficient to stamp it with fraud, but it is a fact or circumstance proper to be considered in evidence in determining the validity or fraudulent character of the conveyance, and which requires the transaction to be subjected to the closest scrutiny.⁸⁴ No presumption of fraud arises from the

82. *Cowling v. Hill*, 69 Ark. 350, 63 S. W. 800, 86 Am. St. Rep. 200; *White v. Magarahan*, 87 Ga. 217, 13 S. E. 509.

83. *First Nat. Bank of Amsterdam v. Miller*, 163 N. Y. 164, 57 N. E. 308.

84. *N. Y.*—*Bristol v. Hull*, 166 N. Y. 59, 59 N. E. 698; *National Bank of Port Jervis v. Bonnell*, 26 Misc. Rep. 541, 57 N. Y. Supp. 486; *Bailey v. Fransioli*, 101 App. Div. 140, 91 N. Y. Supp. 852; *First Nat. Bank v. Moffatt*, 77 Hun, 468, 28 N. Y. Supp. 1078; *Morris v. Morris*, 71 Hun, 45, 24 N. Y. Supp. 579; *Scotfield v. Spaulding*, 54 Hun, 523, 7 N. Y. Supp. 927; *Nichols v. Morrow*, 11 N.

Y. Supp. 878; *Pell v. Tredwell*, 5 Wend. 661.

Ala.—*Morrow v. Campbell*, 118 Ala. 330, 24 So. 852; *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538; *Harmon v. McRae*, 91 Ala. 401, 8 So. 548; *Barnard v. Davis*, 54 Ala. 565.

Cal.—*Gray v. Galpin*, 98 Cal. 633, 33 Pac. 725. See *Bank of Willows v. Small*, 144 Cal. 709, 98 Pac. 263.

Ga.—*Cooley v. Abbey*, 111 Ga. 439, 36 S. E. 786, such a conveyance, while regarded with suspicion, will stand unless shown to be fraudulent, which fact is entirely within the province of the jury to determine.

Ill.—*Hewitt v. Gibson*, 93 Ill. App. 427, where a daughter sold household

mere fact of relation; presumptions are in favor of the fairness

goods, including a piano, to her father, who took exclusive possession, the mere fact of the relationship, and that the daughter, after several months, returned and lived with the father, did not subject the piano to the daughter's debts.

Iowa.—Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002, the relationship of the parties is proper to be considered, but not necessarily indicative of fraud.

Ky.—Redd v. Redd, 23 Ky. L. Rep. 2379, 67 S. W. 367; Williams v. Tye, 19 Ky. L. Rep. 818, 42 S. W. 90; Green v. Green, 4 Ky. L. Rep. 250, the court will look with more vigilance into the transaction than where the sale is to a stranger.

La.—Maurin v. Rouguer, 19 La. 594; Layson v. Rowan, 7 Rob. 1.

Minn.—Nichols, etc., Co. v. Gerlich, 84 Minn. 483, 87 N. W. 1120.

Mo.—White v. Million, 114 Mo. App. 70, 89 S. W. 599; State v. True, 20 Mo. App. 176. See also McKinney v. Hensley, 74 Mo. 326.

Mont.—Mueller v. Renkes (1904), 77 Pac. 512; Noyes v. Ross, 23 Mont. 425, 59 Pac. 367, 75 Am. St. Rep. 543, 47 L. R. A. 400.

Neb.—Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500, in case of a gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises, as between the parties thereto, from the mere fact of relation.

N. J.—First Nat. Bank v. Cummins, 38 N. J. Eq. 191; Hoboken Sav. Bank v. Beekman, 36 N. J. Eq. 83.

N. C.—Mitchell v. Eure, 126 N. C. 77, 35 S. E. 190; Kelly v. Fleming, 113 N. C. 133, 18 S. E. 81, a conveyance from a parent to a child is not,

in law, 'presumptively fraudulent, unless it be shown to be a voluntary conveyance, or one upon insufficient consideration, while the parent is in embarrassed circumstances; Jenkins v. Peace, 46 N. C. 413, the related parties are held to a stricter and more exact proof of the fairness of the transaction.

Pa.—In re Weldon's Estate, 31 Pa. Super. Ct. 47, the mere fact of relationship did not invalidate as fraudulent a judgment note given by a debtor to his son; Sebring v. Brickley, 7 Pa. Super. Ct. 198, 42 Wkly. Notes Cas. 189, assignment by an insolvent father to his son of policies on his wife's life is not necessarily fraudulent.

S. C.—Weaver v. Wright, 13 Rich. 9.

S. D.—Studebaker Bros. Mfg. Co. v. Zollars, 12 S. D. 296, 81 N. W. 292.

Tenn.—Rosenbaum v. Davis (Ch. App. 1898), 48 S. W. 706.

W. Va.—Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451; Farmers' Transp. Co. v. Swaney, 48 W. Va. 272, 37 S. E. 592; Douglass v. Douglass, 41 W. Va. 13, 23 S. E. 671; Hardin v. Wagner, 22 W. Va. 356.

Wis.—Missinski v. McMurdo, 107 Wis. 578, 83 N. W. 758; Bleiler v. Moore, 88 Wis. 438, 60 N. W. 792; Barr v. Church, 82 Wis. 382, 52 N. W. 591.

Eng.—See Golden v. Gillam, 51 L. J. Ch. 503.

Contra.—Business dealings between parents and children are to be treated as are the transactions of other people, and if the *bona fides* thereof is attacked, the fraud alleged must be

of the transaction, rather than otherwise.⁸⁵ Whether conveyances from parent to child or from child to parent are fraudulent or not has been held to depend on the intent with which they were made.⁸⁶ Land conveyed to a father in trust for his minor child, who pays the consideration with money given to him by the father while solvent, cannot be reached by creditors of the father where he has transferred it to the son after becoming insolvent.⁸⁷ Where the wife's father paid one-third of the consideration for the land purchased by the husband under an agreement, to which the wife was a party, that she should own one-third of the land and its proceeds, but the husband took the title to himself, a deed executed by him after he became insolvent, and after the wife's death, conveying one-third of the land to her infant son by direction of the father, will not be set aside at the instance of the husband's creditors.⁸⁸ A conveyance by a father to his children in settlement of *bona fide* gifts received from their deceased mother's father, although made with a fraudulent intent on his part, is not illegal if they did not share in the fraudulent purpose.⁸⁹ A voluntary conveyance by a married woman to her children is void against a mechanic's

proved. *Curry v. Lloyd*, 22 Fed. 258; *Reehling v. Byers*, 94 Pa. St. 316.

No more stringent proof of good faith is required than in the instance of transactions between strangers. *Seitz v. Rennig*, *Lehigh Val. L. Rep.* 130.

A voluntary conveyance from father to child is constructively fraudulent as to an existing creditor, unless the grantor has remaining after the conveyance sufficient property to satisfy his creditors. *Campbell v. Campbell* (Iowa), 105 N. W. 583.

It is error to charge that relationship affords ground for suspicion as to the good faith of the mortgagee, as against other creditors, and calls for satisfactory proof of good faith.

Gilmore v. Swisher, 59 Kan. 172, 52 Pac. 426.

85. *Maurin v. Rouguer*, 19 La. 594; *State v. True*, 20 Mo. App. 176; *Weaver v. Wright*, 13 Rich. (S. C.) 9; *Bleiler v. Moore*, 88 Wis. 438, 60 N. W. 792.

86. *Barnard v. Davis*, 54 Ala. 565; *Miller v. Thompson*, 3 Port. (Ala.) 196; *May v. Hoover*, 48 Neb. 199, 66 N. W. 1134.

87. *Hayford v. Wallace* (Cal. 1896), 46 Pac. 293.

88. *Sparks v. Colson*, 109 Ky. 711, 22 Ky. L. Rep. 1369, 60 S. W. 540, 23 Ky. L. Rep. 145, 63 S. W. 739.

89. *Gleitz v. Schuster*, 168 Mo. 298, 67 S. W. 561, 90 Am. St. Rep. 461.

lien for a debt contracted by her for the improvement of the land conveyed.⁹⁰ But a conveyance from a mother to her daughter is not in fraud of creditors, where the conveyance was made in consideration of money to the value of the property given to the mother for the use of the daughter by the grandmother of the daughter, and which the mother had applied to her own use.⁹¹ While a voluntary conveyance to a child of the grantor, or a conveyance for less than the fair value of the property, when the grantor is insolvent or greatly indebted at the time, is *prima facie* evidence of fraud, or presumptively fraudulent,⁹² the presumption may be rebutted by proof of good faith, and the want or inadequacy of consideration is not of itself necessarily conclusive evidence of fraud.⁹³ Where the father, without consulting the daughter, purchased for her certain land, and paid a part of the price with money belonging to her, and the daughter later ratified the purchase and paid another installment on the price, and the father, being indebted at the time of the pur-

90. Bankard v. Shaw, 23 Pa. Co. Ct. 561, 16 Montg. Co. L. R. 137, 30 Pittsb. L. J. N. S. 413.

91. National Bank of Port Jervis v. Bonnell, 26 Misc. Rep. (N. Y.) 541, 57 N. Y. Supp. 486.

92. N. Y.—First National Bank v. Moffatt, 77 Hun, 468, 28 N. Y. Supp. 1078; Pell v. Tredwell, 5 Wend. 661.

Ind.—Tyner v. Somerville, 1 Ind. 175.

Iowa.—Johnston Harvester Co. v. Cibula, 62 Iowa, 697, 13 N. W. 418.

Ky.—Cincinnati, etc., Co. v. Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242; City Nat. Bank v. Gardner, 5 Ky. L. Rep. 689.

Mo.—Mason v. Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Imhoff v. McArthur, 146 Mo. 371, 48 S. W. 456; Lionberger v. Baker, 14 Mo. App. 353.

N. J.—Le Herisse v. Hess (Ch. 1904), 57 Atl. 808; Mason v. Somers,

59 N. J. Eq. 451, 45 Atl. 602; First Nat. Bank v. Cummins, 38 N. J. Eq. 191.

N. C.—McCanless v. Flinchum, 89 N. C. 373; Tredwell v. Graham, 88 N. C. 208.

W. Va.—Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133.

Can.—McDonald v. McQueen, 9 Manitoba, 315.

93. Caldwell v. Deposit Bank, 18 Ky. L. Rep. 156, 35 S. W. 625; Green v. Green, 4 Ky. L. Rep. 250; Commonwealth Bank v. Kearns, 100 Md. 202, 59 Atl. 1010; F. & M. Shaefer Brew. Co. v. Moebs, 187 Mass. 571, 73 N. E. 858; Richards v. Vacarro, 67 Miss. 516, 7 So. 506, 19 Am. St. Rep. 322, the burden of showing good faith is on the grantee; Gibson v. Hill, 23 Tex. 77, the evidence of good faith should be indisputable.

chase, immediately after the service of a summons on him to recover such indebtedness, formally assigned the contract to purchase the land, which he had taken in his own name, to the daughter, such purchase and transfer was not fraudulent as to his creditors.⁹⁴

§ 9. **Procuring conveyance from third person.**—Where a debtor purchases land with his own money and takes the conveyance in the name of his child for the purpose of securing the land against his debts, and defrauding his creditors, the transaction is fraudulent, and the creditors, having obtained judgment, may by bill in equity, subject the land to their debts.⁹⁵ A deed is not fraudulent if procured to be made by a father to his son in payment of a just debt, though the father be embarrassed in circumstances.⁹⁶ A purchase with his own funds by one who causes the title to land to be made to himself as trustee for a minor child is, in the absence of any valid consideration, equivalent to a gift to the child; and the fact that the father mistakenly supposed that the child had a valid, legal claim against him, and intended thus to settle it, does not invalidate such deed as against creditors of the father, if he was in fact solvent at the time of the conveyance, and had no intention to hinder, delay, or defraud his creditors.⁹⁷

94. *Gehres v. Wallace*, 38 Wash. 101, 80 Pac. 273.

95. *Ala.*—*Patterson v. Campbell*, 9 Ala. 933.

Cal.—*Lander v. Beers*, 48 Cal. 546.

Ind.—*Demaree v. Driskill*, 3 Blackf. 115.

Iowa.—*Smalley v. Mass*, 72 Iowa, 171, 33 N. W. 619; *State Bank of Indiana v. Harrow*, 26 Iowa, 426.

La.—*Frazer v. Pritchard*, 6 La. Ann. 728.

N. C.—*Wall v. Fairley*, 73 N. C. 464.

S. C.—*Godbold v. Lambert*, 8 Rich. Eq. 155, 70 Am. Dec. 192; *Croft v. Arthur*, 3 Desauss. 223.

Va.—*Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757.

96. *Vattier v. Hinde*, 32 U. S. 252, 8 L. Ed. 675, *rev'g* Fed. Cas. No. 6,512, 1 McLean, 110.

97. *Cohen v. Parish*, 105 Ga. 339, 31 S. E. 205.

CHAPTER X.

RESERVATIONS AND TRUSTS FOR GRANTOR.

- Section 1.** Benefits reserved to grantor in general as element or evidence of fraud.
2. Conveyances in trust for grantor.
 3. What constitutes conveyances in trust for grantor.
 4. Reservation of life estate in grantor.
 5. Reservation of life estate with power of appointment at death.
 6. Reservation of power to revoke.
 7. Reservation of support or care of grantor or family.
 8. Reservation of surplus.
 9. Reservation of power to direct application of proceeds.
 10. Employment of debtor.
 11. Reservation of right of repurchase or return of property.
 12. Reservation of power to appoint substitute trustee.
 13. Reservation of exempt property.
 14. Secret reservations or trusts as element or evidence of fraud.
 15. What constitutes a secret reservation or trust.
 16. Absolute conveyance intended as security.
 17. Absolute sale with reservation of surplus.
 18. Reservation of right to repurchase.
 19. Employment of debtor.
 20. Future support of grantor.
 21. Purchase at execution or other sale for benefit of debtor.
 22. Subsequent disposition of property by debtor in creditor's favor.
 23. Discharge of secret trust by subsequent agreement.

Section 1. Benefits reserved to grantor in general as element or evidence of fraud.—As a general rule a transfer of real or personal property, or any provision in such a transfer, by a person indebted at the time, by which the grantor secures or reserves some benefit or advantage to himself or family, or to any other person for him, at the expense of his creditors, unless assented to by them, is deemed fraudulent and void as to existing creditors.¹ The

¹ N. Y.—*Young v. Heermans*, 60 N. Y. 374; *Elias v. Farley*, 3 Keyes, 398, 2 Abb. Dec. 11, 2 Transe. App. 116, 5 Abb. Pr. N. S. 39; *Spotten v. Keeler*, 12 St. Rep. 385; *Austin v. Bell*, 20 Johns. 442, 11 Am. Dec. 297; *Sturtevant v. Ballard*, 9 Johns. 337, 6 Am. Dec. 281; *Cooke v. Smith*, 3 Sandf. Ch. 333. A mortgage by a corporation, reserving the power to

same rule applies to a transfer whereby creditors are prevented from compelling an immediate appropriation of the debtor's prop-

sell the personal property and use the income in the business, and not requiring the application of the proceeds to any particular purpose, but for the use of the mortgagor, is void as to creditors. *Zartman v. First Nat. Bank*, 109 App. Div. 406, 96 N. Y. Supp. 633.

U. S.—*Robinson v. Elliott*, 22 Wall. 513, 22 L. Ed. 758; *Clements v. Moore*, 73 U. S. 299, 18 L. Ed. 786; *Kellog v. Richardson*, 19 Fed. 70; *Howe Mach. Co. v. Claybourn*, 6 Fed. 438; *Burbank v. Hammond*, 4 Fed. Cas. No. 2,137, 3 Sumn. 429. See *Imperial Woolen Co. v. Longbottom*, 143 Fed. 483, where a conveyance was held not to be fraudulent in law or fact, where all the creditors but one assented, and such one expressed no objection.

Ala.—*McDowell v. Steele*, 87 Ala. 493, 6 So. 288; *Pritchett v. Pollock*, 82 Ala. 169, 2 So. 735; *Sandlin v. Robbins*, 62 Ala. 477; *Stokes v. Jones*, 18 Ala. 734.

Ark.—*Sparks v. Mack*, 31 Ark. 666.

Cal.—*Riddell v. Shirley*, 5 Cal. 488.

Colo.—*Wellington v. Terry* (1907), 88 Pac. 467, where chattels covered by a mortgage are sold by the mortgagor with the acquiescence of the mortgagee, and the proceeds are applied to any other purpose than that of liquidating the mortgage debt, the mortgage is void at the instance of creditors of the mortgagor; *Taub v. Swofford Bros. Dry Goods Co.*, 8 Colo. App. 213, 45 Pac. 513.

Ga.—*Coleman, etc., Co. v. Rice*, 115 Ga. 510, 42 S. E. 5; *Mitchell v. Stetson*, 64 Ga. 442, two years' reser-

vation of the use and possession of land sold a few weeks before judgment by an insolvent debtor destroys the validity of the conveyance so far as such judgment creditor is concerned; *Edwards v. Stinson*, 59 Ga. 443; *Hobbs v. Davis*, 50 Ga. 213; *Eastman v. McAlpin*, 1 Ga. 157.

Ill.—*Hurd v. Ascherman*, 117 Ill. 501, 6 N. E. 160; *Gardner v. Commercial Nat. Bank*, 95 Ill. 298, a conveyance made to secure an extension of time or other benefits to the grantor is void as to creditors; *Hardin v. Osborne*, 60 Ill. 93; *Beidler v. Grane*, 22 Ill. App. 538, *aff'd* 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, an absolute assignment of letters patent which the assignee transferred to a corporation organized for the manufacture of the patented article, is fraudulent and void, where the assignor controlled the operation of the corporation for his own benefit.

Ky.—*German Ins. Bank v. Nunes*, 80 Ky. 334.

La.—*Bank of Mobile v. Harris*, 6 La. Ann. 811.

Me.—*Jones v. Light*, 86 Me. 437, 30 Atl. 71; *Wymann v. Brown*, 50 Me. 139; *Smith v. Parker*, 41 Me. 452.

Md.—*Franklin v. Claffin*, 49 Md. 24.

Mass.—*Pacific Nat. Bank v. Windram*, 133 Mass. 175.

Minn.—*Williams v. Kemper* (1906), 109 N. W. 242; *Pabst Brew. Co. v. Butchart*, 67 Minn. 191, 69 N. W. 809, 64 Am. St. Rep. 408.

Miss.—*Wooten v. Clark*, 23 Miss. 75; *Arthur v. Commercial, etc., Bank*, 17 Miss. 394, 48 Am. Dec. 719.

erty to the payment of his debts.² Such a conveyance is fraudulent as to the creditors of the grantor, whether the benefit reserved

Mo.—Bigelow v. Stringer, 40 Mo. 195; Zeigler v. Maddox, 26 Mo. 575; Monarch Rubber Co. v. Bunn, 78 Mo. App. 55.

N. H.—Coolidge v. Melvin, 42 N. H. 510; Albee v. Webster, 16 N. H. 362; Trask v. Bowers, 4 N. H. 309, the transfer must be without any trust whatever, either express or implied. Compare Low v. Carter, 21 N. H. 433.

N. C.—Holmes v. Marshall, 78 N. C. 262; Carter v. Cocke, 64 N. C. 239; Sturdivant v. Davis, 31 N. C. 365.

Pa.—Houseman v. Grossman, 177 Pa. St. 453, 35 Atl. 736; Hennon v. McClane, 88 Pa. St. 219; Bentz v. Rockey, 69 Pa. St. 71; Johnson v. Harvey, 2 Pen. & W. 82, 21 Am. Dec. 426; Pennsylvania Knitting Mills v. Bibb Mfg. Co., 12 Pa. Super. Ct. 346; Low v. Ivy, 10 Pa. Super. Ct. 32.

S. C.—Smith v. Hewry, 1 Hill, 16.

Tenn.—Doyle v. Smith, 41 Tenn. 15; Austin v. Johnson, 26 Tenn. 191; Gibbs v. Thompson, 26 Tenn. 179.

Tex.—Donnebaum v. Tinsley, 54 Tex. 362, a voluntary conveyance by a husband of all his property to his wife, reserving it to himself and his heirs after his death, should she separate from him or again marry, is void as against his existing creditors; Baldwin v. Peet, 22 Tex. 708, 75 Am. Dec. 806; Reynolds v. Lansford, 16 Tex. 286.

Va.—Rucker's Adm'r's v. Moss, 84 Va. 634, 5 S. E. 527; Young v. Willis, 82 Va. 291.

W. Va.—Lockhard v. Beckley, 10 W. Va. 87.

Wis.—Merchants', etc., Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108; First Nat. Bank v. McDonald Mfg. Co., 67 Wis. 373, 28 N. W. 225, a provision in a deed of trust allowing the trustee to continue the business in the old way for an indefinite time.

Eng.—Twine's Case, 3 Coke, 80a, 1 Smith Lead. Cas. 1; In re Pearson, 3 Ch. Div. 807, 35 L. T. Rep. N. S. 68, 25 Wkly. Rep. 126; Ware v. Gardner, L. R. 7 Eq. 317, 38 L. J. Ch. 348, 20 L. T. Rep. N. S. 71, 17 Wkly. Rep. 439; French v. French, 6 De G. M. & G. 95, 2 Jur. N. S. 169, 25 L. J. Ch. 612, 4 Wkly. Rep. 139, 55 Eng. Ch. 74, 43 Eng. Reprint, 1166; Neale v. Day, 4 Jur. N. S. 1225, 28 L. J. Ch. 45, 7 Wkly. Rep. 45; Higginbotham v. Holme, 12 Rev. Rep. 146, 19 Ves. Jr. 88, 34 Eng. Reprint, 451.

A deed of trust reserving to the grantor the use of the property until creditors could order a sale (Lanier v. Driver, 24 Ala. 149), or the use and profits for a definite period by paying annual interest on certain debts, a sale to be made at the end of that period at the instance of the majority of the unpaid creditors (Young v. Willis, 82 Va. 291), is not *per se* fraudulent on its face. See also Keagy v. Trout, 85 Va. 390, 7 S. E. 329.

2. Young v. Heermans, 66 N. Y. 374. An assignment of all his property by a debtor for less than one-third of its value, in order to prevent the same from being subjected to a forced sale, was fraudulent as against creditors, where the assignee under-

to him was great or small,³ but not where a reservation is merely incidental.⁴ One of the surest tests of a fraudulent conveyance is that it reserves to the grantor an advantage inconsistent with its avowed object or purpose,⁵ or an unusual indulgence,⁶ and such a conveyance is void as against creditors and subsequent purchasers. Where a conveyance, professedly to indemnify creditors, expressly or impliedly reserves to the grantor powers inconsistent with, or adequate to defeat, such purpose, it is void as to creditors.⁷ A conveyance made to prefer one or more creditors, by which the debtor obtains a benefit for himself or his family, is fraudulent towards other creditors, as being intended to hinder, delay and defeat them. The law allows a debtor to give a preference to one creditor over another, but it will not allow him to secure an advantage to himself, at the expense of creditors, as the price of such preference.⁸ To render a transfer voidable, however, there must

stood the assignor's necessities, and that the assignment covered all property available for the satisfaction of creditors, regardless of whether the assignee intended ultimately to turn any surplus over to the assignor or to keep it himself. *Wahlheimer v. Truslow*, 106 App. Div. (N. Y.) 73, 94 N. Y. Supp. 137. But see *Whitson v. Griffin*, 39 Kan. 211, 17 Pac. 801, 7 Am. St. Rep. 546, a chattel mortgage made in good faith, by which the mortgagor receives some benefit, is not void, though the property is thereby placed out of the reach of creditors.

3. *Tissier v. Wailes* (Ala. 1905), 39 So. 924.

4. *Shoemaker v. Hastings*, 61 How. Prac. (N. Y.) 79; *Camp v. Thompson*, 25 Minn. 175.

5. *Thompson v. Furr*, 57 Miss. 484; *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580; *Lang v. Lee*, 3 Rand. (Va.) 410; *Kuhn v. Mack*, 4 W. Va. 186.

6. *Thompson v. Furr*, 57 Miss. 484.

7. *Saunders v. Waggoner*, 82 Va. 316.

8. N. Y.—*Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477; *aff'g Hopkins*, 373.

Ark.—*Sparks v. Mack*, 31 Ark. 666.

Ind.—*Noyes v. Tootle*, 2 Ind. T. 144, 48 S. W. 1031.

Minn.—*Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746, a scheme by an insolvent debtor and a preferred creditor to dispose of the entire stock of such debtor, to put the purchase price into a homestead for the benefit of the debtor, and fraudulently apply the balance to pay the creditor, is illegal in so far, at least, as the preferred creditor is concerned.

N. C.—*Hafner v. Irwin*, 23 N. C. 490.

Pa.—*Thornburn v. Thompson*, 192 Pa. St. 298, 43 Atl. 992; *Bentz v. Rockey*, 69 Pa. St. 71.

be some interest left to the debtor in the property, some reservation inconsistent with a true sale, or some hiding or cloaking of the surplus, so as to cover it up for the benefit of the debtor or his family.⁹ A transfer of personal property accompanied by an actual and continued change of possession is not fraudulent as to creditors because made in consideration of a promise by the transferee to use the property in a certain manner, which would confer pecuniary profit on the transferrer,¹⁰ nor because the consideration is largely for services to be performed in the future.¹¹ A mortgage is not void as to creditors, on the ground of reserving an interest to the mortgagor, because it secures claims that certain co-sureties of his may have upon him for contribution,¹² nor because it includes a small claim on behalf of another creditor in addition to the *bona fide* debt which it was given to secure.¹³ A transaction in which one creditor consents, upon receiving security by way of mortgage, to give indulgence to his debtor, is not fraudulent as to other creditors,¹⁴ nor is a judgment by confession fraudulent as to creditors, as reserving a benefit for the debtor, because

R. I.—Lennon v. Parker, 22 R. I. 43, 46 Atl. 44.

S. C.—Smith v. Henry, 1 Hill, 16.

Tenn.—Austin v. Johnson, 26 Tenn. 191.

Tex.—Temple Grocer Co. v. Claibough, 18 Tex. Civ. App. 655, 45 S. W. 482. See also Preferences—Knowledge and intent of parties, chap. XI, §§ 21, 22, *infra*.

9. Hobbs v. Davis, 50 Ga. 213, one has a right under the law to buy in good faith of a debtor in insolvent circumstances, and pay in a debt due from the insolvent to the purchaser, if it be in truth a purchase, if it be not a mere scheme to get the effects away from the creditors, or if there be no trust or reserve of any surplus to the debtor's benefit; and that, in addition to the purchaser's debt, the purchaser gives something more,

either in money or in his own note, does not alter the case.

Paying money to a debtor to secure from him a preferential conveyance to a creditor is not fraudulent as to creditors as in violation of the statutory provision against reservations for the benefit of the grantor. Bangs Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923.

10. Lewin v. Hopping, 67 Cal. 541, 8 Pac. 73.

11. Farmers', etc., Nat. Bank v. Mosher, 63 Neb. 130, 88 N. W. 552.

12. Steele v. Farber, 37 Mo. 71.

13. Taylor v. Harle-Haas Drug Co. (Neb. 1903), 96 N. W. 182.

14. Harshaw's Ex'rs v. Woodfin, 64 N. C. 568, the equity of redemption is open to the creditors, and a purchaser would have an election, either to pay the mortgage debt and

of a stipulation therein that no execution shall issue for a certain time.¹⁵ A deed of trust of a mining company's property, authorizing the company to dispose of any machinery covered thereby which cannot be advantageously used, it to replace it by other machinery of at least equal value, is not within a statute avoiding conveyances of chattels to the use of the grantor.¹⁶ A reservation to the debtor in a deed is not a conclusive badge of fraud, if the deed can be construed as a mortgage or otherwise so as to be consistent with the reservation, as of the surplus; for that can be readily reached in equity, like any other property, and the purpose is apparent on the face of the transaction.¹⁷ Thus, a transfer by an insolvent to one of his creditors is not void as to other creditors because it provides that, if the property transferred is of a value in excess of the debt constituting the consideration, the excess shall remain in the hands of the vendee to be paid on the order of the vendor to his other creditors, since no benefit is stipulated or provided to or for the debtor beyond what the law, without such agreement, would secure to him.¹⁸ Under the law of Pennsylvania, a reservation of title in a contract under which goods are delivered to another until the purchase price shall have been paid is void as against creditors of the person in possession, whatever may be the form of the contract, if it is essentially one of conditional sale, and not of bailment.¹⁹

§ 2. **Conveyances in trust for grantor.**—It is well established as a general rule that a debtor cannot settle his estate in trust for his own use or benefit, so as to free it from liability for his debts, and such a conveyance or transfer by a debtor is fraudulent and void as against his creditors, whether prior or subsequent, and the

call for title, or else take the benefit of the extended credit.

15. *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765.

16. *Hasbronck v. Rich*, 113 Mo. App. 389, 88 S. W. 131.

17. *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806.

18. *Goetter v. Smith*, 104 Ala. 481, 16 So. 534; *Harmon v. McRae*, 91 Ala. 401, 8 So. 548; *McDowell v. Steele*, 87 Ala. 493, 6 So. 288.

19. *In re Tice*, 139 Fed. 52.

property may be subjected by them to the payment of their debts.²⁰ A conveyance made to the use of the grantor is fraudulent without regard to the existence of an intention to defraud and though there was no fraudulent intent to hinder or delay creditors.²¹ The statute of Henry VII, enacted in 1487, against trusts in personal property for the use of the persons creating them, re-enacted in New York in 1787, and in many other jurisdictions with immaterial

20. *N. Y.*—*Young v. Heermans*, 66 N. Y. 374; *Collumb v. Caldwell*, 16 N. Y. 484; *Curtis v. Leavitt*, 15 N. Y. 9; *Vilas Nat. Bank v. Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009; *Bier v. Kibbe*, 43 Hun, 174; *Spotten v. Keeler*, 12 N. Y. St. Rep. 385.

Ala.—*Smith v. Hill*, 103 Ala. 235, 15 So. 525, void as against creditors existing and subsequent; *McDermott v. Eborn*, 90 Ala. 258, 7 So. 751; *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429; *Sandlin v. Robbins*, 62 Ala. 477; *Reynolds v. Crook*, 31 Ala. 634; *Johnson v. Thweatt*, 18 Ala. 741.

Colo.—*Innis v. Carpenter*, 4 Colo. App. 30, 34 Pac. 1011.

Ga.—*Coleman, etc., Co. v. Rice*, 115 Ga. 510, 42 S. E. 5; *Hobbs v. Davis*, 50 Ga. 213; *Eastman v. McAlpin*, 1 Ga. 157; *Cameron v. Scudder*, 1 Ga. 204.

Ill.—*Hardin v. Osborne*, 60 Ill. 93.

Ind.—*Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562; *Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Iowa.—*Hook v. Mowre*, 17 Iowa, 195.

Kan.—*Clark v. Robbins*, 8 Kan. 574.

Me.—*Hamlin v. Bridge*, 24 Me. 145; *Legro v. Lord*, 10 Me. 161.

Minn.—*Smith v. Conkright*, 28 Minn. 23, 8 N. W. 876.

Mo.—*Bigelow v. Stringer*, 40 Mo. 195; *Armstrong v. Tuttle*, 34 Mo.

432; *Robinson v. Robards*, 15 Mo. 459; *Scudder v. Payton*, 65 Mo. App. 314; *State of Mueller*, 10 Mo. App. 87; *State of Jacob*, 2 Mo. App. 183.

Neb.—*Graham v. Townsend*, 62 Neb. 364, 87 N. W. 169.

N. J.—*Newman v. Van Duyne*, 42 N. J. Eq. 485, 7 Atl. 897.

N. C.—*Carter v. Cocke*, 64 N. C. 239; *Sturdivant v. Davis*, 31 N. C. 365; *Smith v. Blank*, 3 N. C. 229.

Pa.—*Ghormley v. Smith*, 139 Pa. St. 584; *Bentz v. Rokey*, 69 Pa. St. 71; *Appeal of Mackason*, 42 Pa. St. 330, 82 Am. Dec. 517; *Hart v. McFarland*, 13 Pa. St. 182; *Shaffer v. Watkins*, 7 Watts & S. 219; *Andrews v. Lewis*, 1 Pa. Co. Ct. 293; *Patrick v. Smith*, 39 Wkly. Notes Cas. 4; *In re Catherwood's Estate*, 29 Wkly. Notes Cas. 344.

S. C.—*Ford v. Caldwell*, 3 Hill, 248; *Wilson v. Cheshire*, 1 McCord Eq. 233.

Tex.—*Rives v. Stephens* (Civ. App. 1894), 28 S. W. 707.

Va.—*Burton v. Mills*, 78 Va. 468; *Lewis v. Caperton*, 8 Gratt. 148.

Wis.—*Stapleton v. Brannan*, 102 Wis. 26, 78 N. W. 181; *Severin v. Rueckerick*, 62 Wis. 1, 21 N. W. 789.

21. *Innis v. Carpenter*, 4 Colo. App. 30, 34 Pac. 1011; *Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562; *Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 18; *State v. Jacob*, 2 Mo. App. 183.

differences in phraseology, applies, however, only to conveyances primarily and wholly for the use of the grantor, and not to instruments made in good faith for the actual and real use of the grantee and where the reservations to the grantor are incidental and partial.²² Its object is to render simply ineffectual purely nominal transfers of personal estate where the entire use and control are, by a declaration of trust in or out of the instrument, left in him who makes the transfer. It is not in any proper sense a statute against frauds, although fraudulent practices may have led to its enactment; but it is founded on the self-evident principle that a man's property should pay his debts, although he has vested a nominal title thereto in some other person. For that purpose the statute declares the title to be in the debtor, and no transfer which is entirely nominal can stand in the way. It has no reference to intentions, whether fraudulent or honest. There may in fact be no creditors until long after the transaction, but if the debtor has property they are entitled to be paid. The simple inquiry is whether the property belongs to the debtor, not upon a theory of fraud and against the terms of his conveyance, but upon a theory of equitable title reserved to himself by the very conveyance which transfers the legal and nominal title to another.²³ The statute has no application to mortgages, trusts, or other instruments created to raise money or secure a creditor. It is the necessary incident of all such transactions that some beneficial interest remains in the debtor, and that the whole belongs to him when he

22. N. Y.—*Curtis v. Leavitt*, 15 N. Y. 9; *Shoemaker v. Hastings*, 61 How. Pr. 79.

Colo.—*Jefferson County Bank v. Hummell*, 11 Colo. App. 337, 53 Pac. 286, a deed intended as a mortgage which expresses a consideration largely in excess of the debt is not constructively fraudulent.

Minn.—*Hunt v. Ahnemann* (1904), 102 N. W. 376, a deed made in consideration of past services of the grantee to the grantor, with his

promise to share the crops with the grantor and pay certain relatives part of the consideration therefor; *Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 818; *Camp v. Thompson*, 25 Minn. 175; *Butler v. White*, 25 Minn. 432, where the reservation was merely of the surplus after satisfying the grantee's claim; *Vose v. Stickney*, 19 Minn. 367; *Truitt v. Caldwell*, 3 Minn. 364, 74 Am. Dec. 764.

23. Curtis v. Leavitt, 15 N. Y. 9.

has discharged the obligation. Therefore, a debtor, whether solvent or insolvent, may, acting in good faith, mortgage a portion or the whole of his property to secure existing claims against him, and also future loans and advances.²⁴ When it appears from the face of a deed that there is a trust or reservation of use to the grantor, the court, as a matter of law, will declare such deed void as against creditors; where such deed is fair on its face, but is affected with a secret trust in favor of the grantor, the existence of fraud is a question of fact.²⁵ While these statutes are in terms limited to goods and chattels, the principle upon which they rest is a part of the common law, and in some jurisdictions it is applied to transfer of realty as well as personal, and a transfer of real or personal property by a debtor to a third party to be held in trust for his use and benefit is held to be void as to existing and subsequent creditors.²⁶

§ 3. What constitutes conveyance in trust for grantor.—A conveyance to pay certain creditors, the surplus to be returned to the grantor, is void as a conveyance in trust for the grantor.²⁷ But neither the statute nor the common law principle, rendering a conveyance void as to creditors which contains a reservation for the

24. *Knapp v. McGowan*, 96 N. Y. 75.

25. *Zeigler v. Maddox*, 26 Mo. 575.

26. *Sandlin v. Robbins*, 62 Ala. 477; *Williams v. Kemper* (Minn. 1906), 109 N. W. 242; *Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 818; *Racek v. First Nat. Bank*, 62 Neb. 669, 87 N. W. 542, under a statute making all transfers of property made in trust for the use of the person making the same void as against existing and subsequent creditors of the transferor, where a debtor conveys realty to his wife without any consideration therefor, to be held for the use and benefit of herself and such debtor, his interest therein may be seized by either prior or subse-

quent creditors for the satisfaction of their claims against him.

But in *Idaho* it is held that a conveyance of land with intent to defraud the grantor's creditors is not within a statute providing that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same," are void as against creditors. *Brown v. Perault*, 5 Ida. 729, 51 Pac. 752.

27. *Collomb v. Caldwell*, 16 N. Y. 484; *Leitch v. Hollister*, 4 N. Y. 211; *Barney v. Griffin*, 2 N. Y. 365; *Dove-mus v. Lewis*, 8 Barb. (N. Y.) 124; *Goodrich v. Downs*, 6 Hill (N. Y.), 438.

benefit of the assignor, applies to an assignment made in good faith of a part of the debtor's property to creditors themselves for the purpose of securing particular demands, though a provision for the repayment of the surplus is contained in the instrument, since such conveyance, whatever may be its form, is in effect but a mortgage of the property transferred, and the residuary interest of the assignor may be reached by legal process or bill in equity.²⁸ A conveyance or assignment of real estate, in consideration of an agreement on the part of the grantee to support the grantor during life, does not create a trust for his benefit so as to render the conveyance void as to his creditors, in the absence of fraud;²⁹ but a conveyance of personal property on such consideration is a conveyance in trust for the use of the grantor within the meaning of the statute, and void as against the grantor's present or subsequent creditors.³⁰ Where a trust deed, executed by a banking association to secure the payment of certain bonds, contained a provision that the trustees might borrow money upon or sell the property assigned, and that after payment of the bonds the remainder of the property should be held in trust for, and subject to the direction of the company, such a reservation of an incidental benefit or residuary interest was held not to be such a trust as is rendered void by the statute, since the trust avoided is merely a passive one, made exclusively for the grantor's use, where the title of the trustee is merely nominal.³¹ A conveyance of a stock in trade to secure a debtor, the grantor to remain in possession until the happening of one or more contingencies specified in the deed, but with no accountability for the proceeds of sales made in the meantime, is a conveyance in trust to the use of the grantor.³² Where a debtor has mortgaged his homestead to secure a loan of the school fund, and subsequently gave a chattel mortgage on a stock of goods to

28. *Leitch v. Hollister*, 4 N. Y. 211; *Bier v. Kibbe*, 43 Hun (N. Y.), 174.

29. *Hungerford v. Cartwright*, 13 Hun (N. Y.), 647; *McLean v. Button*, 19 Barb. (N. Y.) 450. But see *Severin v. Rueckerick*, 62 Wis. 1, 21 N. W. 789.

30. *McLean v. Button*, 19 Barb. (N. Y.) 450; *Severin v. Rueckerick*, 62 Wis. 1, 21 N. W. 789.

31. *Curtis v. Leavitt*, 15 N. Y. 9.

32. *Armstrong v. Tuttle*, 34 Mo. 432.

secure certain specified debts, directing that the surplus be applied to the payment of the school fund debt, it is a conveyance for the use of the debtor, and therefore fraudulent and void as to creditors.³³ But where insolvent debtors have made a conveyance of their property to a particular creditor, the mere fact of a reservation in the deed of the surplus which shall remain after payment of such creditor's debt will not of itself make the conveyance fraudulent, as being to the use of the grantors.³⁴ An assignment of property in trust to sell part of it to pay for advances, and to retain part of it subject to the order of the assignor, is fraudulent as against the creditors of the assignor.³⁵

§ 4. **Reservation of life estate in grantor.**—A person cannot place or settle his property in trust with remainder over, reserving to himself the beneficial interest for his life, subject to the expenses of the trust, and thereby put his life interest beyond the reach of his creditors, either prior or subsequent, by any provision restricting the power of alienation or otherwise.³⁶ A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income and revenue therefrom through the in-

33. *Paddock-Hawley Iron Co. v. McDonald*, 61 Mo. App. 559.

34. *Bigelow v. Stringer*, 40 Mo. 195. But see *Johnson v. Sage* (Ida. 1896), 44 Pac. 641.

35. *Hart v. McFarland*, 13 Pa. St. 182.

36. *N. Y.*—*Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; *Young v. Heermans*, 66 N. Y. 374.

U. S.—*De Hierapolis v. Lawrence*, 115 Fed. 761.

Kan.—*Polley v. Johnson*, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258.

Md.—*Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 67 Am. St. Rep. 334, 39 L. R. A. 806.

Mass.—*Pacific Nat. Bank v. Windram*, 133 Mass. 175.

Mo.—*Lambert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 9 Am. St. Rep. 358, 2 L. R. A. 213; *Donovan v. Dunning*, 69 Mo. 436; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295.

Pa.—*Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565; *Appeal of Mackason*, 42 Pa. St. 330, 82 Am. Dec. 517; *In re Catherwood's Estate*, 29 Wkly. Notes Cas. 344; *Andress v. Lewis*, 17 Wkly. Notes Cas. 270, 1 Pa. Co. Ct. 293.

Va.—*Lewis v. Caperton*, 8 Gratt. 148.

A deed conveying a slave for a valuable consideration, with a reservation of possession to the vendor during his life or pleasure, is valid. *Gullett v. Lamberton*, 6 Ark. 109.

strumentality of a trustee, cannot be created even by a married woman or a woman in contemplation of marriage,³⁷ or by an unmarried woman.³⁸ A transfer by a debtor of all his property, both real and personal, without consideration, in trust for himself and for his benefit during life, and after his death for the payment of his debts, etc., is *per se* conclusive evidence of fraud as to existing creditors, and therefore void as against them.³⁹ The reservation of a life estate in a conveyance of property by a person largely indebted at the time is generally held to be evidence of fraud, either actual or constructive, rendering the whole conveyance fraudulent and liable to annulment at the instance of existing creditors,⁴⁰ and in some jurisdictions of subsequent creditors.⁴¹ And such a conveyance cannot be upheld as to the reservation of the life estate to the extent of requiring that the land be sold subject to the life interest as an encumbrance.⁴²

§ 5. Reservation of life estate with the power of appointment

37. *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 39 L. R. A. 806, *citing* *Warner v. Rice*, 66 Md. 436; *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 113; *Ghormley v. Smith*, 139 Pa. St. 584, 11 L. R. A. 565; *Appeal of Mackason*, 42 Pa. St. 330, 82 Am. Dec. 517.

38. *Ghormley v. Smith*, 139 Pa. St. 584; *In re Catherwood's Estate*, 29 Wkly. Notes Cas. (Pa.) 344.

39. *Young v. Heermans*, 66 N. Y. 374.

40. *Ala.*—*Sandlin v. Robbins*, 62 Ala. 477.

Ind.—*McNally v. White*, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214.

N. H.—*Coolidge v. Melvin*, 42 N. H. 510. But a conveyance in trust for the wife and children of the grantor, and in trust for the grantor for life in case he survive his wife,

is not void. *Low v. Carter*, 21 N. H. 433. *Ohio.*—*Berry v. Haas*, 12 Ohio Cir. Ct. 189, 5 Ohio Cir. Dec. 48.

S. C.—*Ford v. Caldwell*, 3 Hill, 248; *De Millon v. McAlliley*, 2 McMull, 499; *Swindersine v. Miscally*, 1 Bailey Eq. 304; *Brown v. McDonald*, 1 Hill, 297.

Eng.—*Taylor v. Jones*, 2 Atk. 600, 26 Eng. Reprint, 758; *Tarback v. Marbury*, 2 Vern. Ch. 510, 23 Eng. Reprint, 926.

41. *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; *Coolidge v. Melvin*, 42 N. H. 510; *Ford v. Caldwell*, 3 Hill (S. C.), 248.

A voluntary deed of slaves, delivered to the grantee, reserving a life estate to the grantor, is valid against purchasers and subsequent creditors. *Adam v. Broughton*, 13 Ala. 731.

42. *McNally v. White*, 154 Ind. 163, 56 N. E. 214.

at death.—A conveyance of property to be held in trust for the benefit of the grantor during his life, with remainder over, with reserved power of appointment or devise or disposition at his death, is fraudulent and void both as to existing and subsequent creditors, and both the principal and income may be subjected to the claims of such creditors.⁴³

§ 6. **Reservation of power to revoke.**—A reservation in a mortgage, deed of trust, or contract for the sale of property of the right or power to the maker or vendor to revoke or rescind the contract and resume the ownership of the property, in a certain event, is inconsistent with a fair, honest, and absolute disposition of the property, and renders the transfer fraudulent and void and subject to be defeated at the instance of creditors of the maker or vendor.⁴⁴ The same rule applies to a conveyance reserving a power equivalent in effect to a power of revocation.⁴⁵ The reservation to the vendee of the right to rescind or cancel the contract at any time before the purchase money is paid and thus restore the ownership of the property to the seller, or the right to relinquish the bargain whenever he chooses and on a redelivery of the property be repaid whatever he has expended, is likewise fraudulent as to

43. *Scott v. Keane*, 87 Md. 709, 40 Atl. 1070, 42 L. R. A. 359; *Brinton v. Hook*, 3 Md. Ch. 477; *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, 27 Wkly. Notes Cas. 331, 23 Am. St. Rep. 215, 11 L. R. A. 565; *Appeal of Mackason*, 42 Pa. St. 330, 82 Am. Dec. 517; *In re Catherwood's Estate*, 29 Wkly. Notes Cas. 344; *Patrick v. Smith*, 2 Pa. Super Ct. 113; *Hunters v. Waite*, 3 Gratt. (Va.) 26.

44. *Westfall v. Jones*, 23 Barb. (N. Y.) 9; *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565; *West v. Snodgrass*, 17 Ala. 549; *Cannon v. Peebles*, 26 N. C. 204; *Jenkyn v. Vaughan*, 3 Drew. 419, 2 Jur. N. S. 109, 25 L. J. Ch. 338, 4 Wkly. Rep. 214.

45. *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565, an assignment in trust to pay certain releasing creditors, but if they should refuse to release, then in trust, after paying a debt due one of the assignees, for such creditors as the assignor should appoint; *Lang v. Lee*, 3 Rand. (Va.) 410, a deed of trust, the sum to be secured thereby not being specified therein, and it being therein agreed that the goods should remain in the possession of the debtor, with authority to make sales of them, but to account to the trustee if called on; *Tarback v. Marbury*, 2 Vern. Ch. 510, 23 Eng. Reprint, 926, a reservation of a power to mortgage.

creditors.⁴⁶ But where a series of assignments were made, the first of them containing a power of revocation, but the last, restating the appointment with some modification, was absolute, it was held that the earlier instruments, though voidable by reason of the power to revoke, were capable of confirmation, and that the last assignment, no liens or proceedings of creditors having then intervened to prevent, was operative as a confirmation, and was legal and valid.⁴⁷ The deposit of an assignment with a stranger after complete execution, to hold until receipt of further orders from the assignor, or to file when, in the judgment of the depositary, it shall be for the best interests of all creditors, amounts to a reservation of power to revoke in the assignor and renders the assignment void.⁴⁸ Where a husband conveyed to his wife certain property for her separate use, reserving in the deed a power of revocation or appointment to other uses, it was held that the reservation did not create an imputation on the grantor's good faith in the transaction as to his creditors.⁴⁹

§ 7. Reservation of support or care of grantor or family.—

Where a debtor, in failing circumstances, stipulates in the sale of his property for the support of himself or of his family for a term of years or for life, the law will regard the transaction with great suspicion, since he thereby secures a benefit to himself at the expense of his creditors; for a purchaser would give less for a property encumbered with such a condition than for a clear right to immediate and untrammelled possession.⁵⁰ Where a conveyance contains a covenant, or a stipulation or provision, that the grantee will support the grantor or his family during life or for a term of years, as a part of the consideration for the transfer, such provision creates a trust in favor of and for the benefit of the grantor

46. *West v. Snodgrass*, 17 Ala. 549; *Shannon v. Commonwealth*, 8 Serg. & R. (Pa.) 444.

47. *Murray v. Riggs*, 15 Johns. (N. Y.) 571, *rev'g* *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565.

48. *Reichenbach v. Winkhaus*, 67

How. Pr. (N. Y.) 512, 12 Daly (N. Y.), 525.

49. *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908. See also *Riggs v. Murray*, 2 Johns. Ch. (N. Y.) 565.

50. *Wooten v. Clark*, 23 Miss. 75.

which renders the conveyance, either *prima facie* or conclusively, fraudulent and void as to existing creditors of the grantor, and the property sold or conveyed may be subjected to their claims either at law or in equity.⁵¹ Where a covenant creating a trust for the support of a grantor is inserted in a deed without the knowledge of the grantee, thus making the transfer void as to the creditors of the grantor, and the grantee, after discovering such covenant, takes no steps to repudiate it, he will be held to have adopted the provision, and will be bound thereby.⁵² It has been held that the law will infer no fraud from a provision for the grantor's support, if the agreement be made in good faith; that the question as to the fraudulent character of such an arrangement is wholly one of fact.⁵³ It has also been held that a contract for the future support of the grantor, as part of the consideration for the sale, does not render the sale necessarily fraudulent as to creditors, but that it must also appear that the grantor was insolvent at the time of the execution.⁵⁴ On the contrary, it has been held that a debtor has no right in this way to secure his property for the use of himself

51. N. Y.—*Stearns v. Gage*, 79 N. Y. 102; *Townsend v. Bumpus*, 29 App. Div. 122, 51 N. Y. Supp. 513; *Todd v. Monell*, 19 Hun, 363; *McLean v. Button*, 19 Barb. 450; *Keep v. Keep*, 7 Abb. N. C. 240. Compare *Hungerford v. Carwright*, 13 Hun, 647.

Ala.—*Sandlin v. Robbins*, 62 Ala. 477; *Green v. Branch Bank*, 33 Ala. 643, but a conveyance by a debtor in trust for payment of his debts and support of his wife and children is not fraudulent on its face as against creditors, not being vitiated by the provision for the benefit of the debtor's family; *Stokes v. Jones*, 18 Ala. 734.

La.—*Duval v. Ardrey*, 1 La. Ann. 243. Compare *Bourgeat v. Dumoulin*, 12 La. Ann. 204.

Me.—*Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663.

Miss.—*Hunt v. Knox*, 34 Miss. 655.

N. H.—*Albee v. Webster*, 16 N. H. 362; *Smith v. Smith*, 11 N. H. 460.

Pa.—*Hauseman v. Grossman*, 177 Pa. St. 453, 35 Atl. 736; *Hennon v. McClane*, 88 Pa. St. 219; *Miner v. Warner*, 2 Grant, 448; *Johnson v. Harvey*, 2 Penr. & W. 82, 21 Am. Dec. 426; *Kirker v. Johnson*, 13 Wkly. Notes Cas. 385.

Wis.—*Stapleton v. Brannan*, 102 Wis. 26, 78 N. W. 181; *Merchants', etc., Sav. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108; *Severin v. Rueckerick*, 62 Wis. 1, 21 N. W. 789.

52. *Townsend v. Bumpus*, 29 App. Div. (N. Y.) 122, 51 N. Y. Supp. 513.

53. *Tibbals v. Jacobs*, 31 Conn. 428.

54. *Faloon v. McIntyre*, 118 Ill. 292, 8 N. E. 315; *Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663.

and his family to the prejudice of those to whom he is indebted at the time, even if he supposes that he has property enough left to satisfy his existing creditors and his intentions are fair; but that if it can be shown that the grantee has paid or secured to the grantor the value of the land apart from the agreement to maintain, and this was done without any design or intention to defraud or delay creditors, the addition of the obligation to maintain will not avoid the conveyance.⁵⁵ A conveyance of personal property, in consideration of the future support of the assignor, his wife and children, is void as to subsequent creditors, under the statutes of New York relating to transfers of personal property in trust for the use of the grantor.⁵⁶ But in other jurisdictions a conveyance in consideration of a life support of the grantor by the grantee has been held valid as against subsequent creditors, if without actual intent to defraud future creditors, the grantor retains property sufficient to satisfy existing creditors.⁵⁷

§ 8. **Reservation of surplus.**—A stipulation in a mortgage or deed of trust, or any other instrument which is in effect a mortgage of real or personal property, given by a failing debtor, that the surplus remaining after paying the debt secured shall be paid to the debtor, does not vitiate it, since the mortgagor or grantor stipulates for nothing more than the law would have given him. The interest of a debtor in the surplus remaining after the property conveyed has been applied to the payment of his debt being available to unsecured creditors by execution or bill in equity, the provision that the surplus be paid to the debtor does not operate to hinder and delay other creditors, so as to render the deed fraudulent as to them. It is but the usual clause in every mortgage upon real estate.⁵⁸ A conveyance of property by an insolvent debtor in

55. *Albee v. Webster*, 16 N. H. 362.

56. *McLean v. Button*, 19 Barb. (N. Y.) 50.

57. *Bowlus v. Shanabarger*, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167; *Holmes v. Penny*, 3 Jur. N. S. 80, 3 Kay & J. 90, 26 L. J. Ch. 179, 5 Wkly. Rep. 132. See also *Faloon*

v. McIntyre, 118 Ill. 292, 8 N. E. 315, a conveyance, though voluntary, is not void as to subsequent creditors.

58. N. Y.—*Hine v. Bowe*, 114 N. Y. 350, 21 N. E. 733; *Royer Wheel Co. v. Fielding*, 101 N. Y. 504, 5 N. E. 431; *Dunham v. Whitehead*, 21 N. Y. 131; *Curtis v. Leavitt*, 15 N. Y. 9;

trust to pay certain creditors to the exclusion of others, with a reservation of the surplus to the debtor, or a conveyance of prop-

Leitch v. Hollister, 4 N. Y. 211; *William Ottman & Co. v. Cooper*, 81 Hun, 530, 30 N. Y. Supp. 1086; *Bier v. Kibbe*, 43 Hun, 174; *Royer Wheel Co. v. Frost*, 13 Daly, 233. *Compare* *Delaney v. Valentine*, 80 Hun, 476, 30 N. Y. Supp. 512; *Jackson v. Brush*, 20 John. 5.

U. S.—*Huntley v. Kingman & Co.*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540; *Fechheimer v. Baum*, 43 Fed. 719, 2 L. R. A. 153. *Compare* *Kellogg v. Richardson*, 19 Fed. 70, decided under Missouri statute.

Ala.—*Loucheim v. First Nat. Bank*, 98 Ala. 521, 13 So. 374; *Perry Ins., etc., Co. v. Foster*, 58 Ala. 502, 29 Am. Rep. 779; *Miller v. Stetson*, 32 Ala. 161; *Brown v. Lyon*, 17 Ala. 659; *Hindman v. Dill*, 11 Ala. 689; *Ravies v. Alston*, 5 Ala. 297; *Johnson v. Cunningham*, 1 Ala. 249; *Malone v. Hamilton, Minor*, 286, 12 Am. Dec. 49.

Ga.—*Calloway v. People's Bank*, 54 Ga. 441; *Lay v. Seago*, 47 Ga. 82; *Carey v. Giles*, 10 Ga. 9.

Ill.—*Beach v. Bestor*, 47 Ill. 521, an assignment of a judgment with an agreement to collect it and pay certain creditors and pay the balance to the assignor was not fraudulent as to creditors.

Ind.—*Hays v. Hostetter*, 125 Ind. 60, 25 N. E. 134, reservation of the surplus to the grantor's wife; *Desar v. Field*, 99 Ind. 548.

Md.—*Fouke v. Fleming*, 13 Md. 392; *McCall v. Hinkley*, 4 Gill, 128.

Mass.—*New England Marine Ins. Co. v. Chandler*, 16 Mass. 275, but the surplus after paying the debt is liable to attachment by trustee process.

Minn.—*Butler v. White*, 25 Minn. 432; *Camp v. Thompson*, 25 Minn. 175. But see *Truitt v. Caldwell*, 3 Minn. 364.

Mo.—*Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Bigelow v. Stringer*, 40 Mo. 195. *Compare* *Padlock-Hawley Iron Co. v. McDonald*, 61 Mo. App. 559; *State v. Mueller*, 10 Mo. App. 87.

N. J.—*Muchmore v. Budd*, 53 N. J. L. 369; 22 Atl. 518, where there is in fact no surplus the transfer is not void *per se*.

N. C.—*Burgin v. Burgin*, 23 N. C. 453.

Pa.—*Sheble v. Bryden*, 114 Pa. 147, 6 Atl. 905.

Tenn.—*Austin v. Johnson*, 26 Tenn. 191.

Tex.—*McClure v. Sheek*, 68 Tex. 426, 4 S. W. 552; *Stiles v. Hill*, 62 Tex. 429; *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806; *Parlin, etc., Co. v. Hanson*, 21 Tex. Civ. App. 401, 53 S. W. 62; *Sutton v. Gregory* (Civ. App. 1898), 45 S. W. 932, a trust deed for the benefit of certain creditors is not illegal because it provides that the surplus remaining after payment of the secured debts shall be subject to the order of the grantors, on the ground that such provision makes it a negotiable instrument; *Puckett v. Richardson Drug Co.*, 1 Tex. Civ. App. 634, 20 S. W. 1127.

Va.—*Harvey v. Anderson* (1896), 24 S. E. 914.

W. Va.—*Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773.

Wis.—*Kneeland v. Cowles*, 3 Pinn. 316, 4 Chidl. 46. But see *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785.

erty by the debtor by way of preference to a creditor or certain creditors, the latter to return the surplus, after satisfying the preferred debts, to the grantor, is fraudulent and void as to other creditors because of the reservation to the debtor.⁵⁹ But a conveyance by a solvent debtor of a portion of his property to trustees to pay a portion of his creditors, containing a provision that any surplus after execution of the trust shall be returned to him, is not, as matter of law, fraudulent as to creditors not provided for.⁶⁰

§ 9. **Reservation of power to direct application of proceeds.**—

An assignment of property by a debtor for the purpose of placing the proceeds under the control of the assignor, or a conveyance by a debtor to a third person in trust, to sell and apply the proceeds to such persons and in such proportions as the debtor shall direct, is fraudulent and void as against prior creditors, since in order to make a valid transfer the debtor must not only part with his property, but must also surrender all power to interfere with or control it or the proceeds thereof afterwards.⁶¹ But a stipulation in an assignment of property to secure an indebtedness that, after working out the indebtedness of the grantor, the grantee shall pay balances as the grantor shall direct, or a reservation in a deed of trust, which in reality is a chattel mortgage, of the surplus to the grantor, is not fraudulent and will not avoid the instrument as against his creditors, since it is no more than the law implies in every transfer of property as a security for debts.⁶² So where property is conveyed to a creditor by way of preference it will not be invalidated because of a provision that the excess over the debt shall be paid to such other creditors as the debtor shall direct, or

59. *Barney v. Griffin*, 2 N. Y. 365; *Strong v. Skinner*, 4 Barb. (N. Y.) 546; *Jackson v. Brush*, 20 Johns. (N. Y.) 5; *Rigor v. Simmons*, 47 Ill. App. 428; *Selz v. Evans*, 6 Ill. App. 466; *Thompson v. Parker*, 83 Ind. 96.

60. *Knapp v. McGowan*, 96 N. Y. 75.

61. *Kittredge v. Slack*, 67 Ill. App.

128; *Mitchell v. Stiles*, 13 Pa. St. 306.

62. *Vallance v. Miners' L. Ins. Co.*, 42 Pa. St. 441; *Huntley v. Kingman & Co.*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540. See also *Chicago, etc., R. Co. v. Watson*, 113 Ill. 195; *Stockbridge v. Franklin Bank*, 86 Md. 189, 37 Atl. 645. See also *Reservation of surplus*, § 8, *supra*.

be retained to be paid on the order of the debtor to his other creditors, as such a provision is merely a recognition of the debtor's legal right to make preferences and is not a reservation of a use or benefit to himself.⁶³ The transfer being absolutely and in good faith made, there is no reason why the debtor may not as well direct payment of the surplus of the consideration by the purchaser upon his debts, or such debts as he may direct, as to take the money and pay it on them himself.⁶⁴

§ 10. **Employment of debtor.**—The fact of a stipulation in a transfer of a stock of goods or other property by a debtor for the employment of the debtor, by the purchaser, after the sale to the latter, at a reasonable compensation for his services, to manage the property, or to assist in the sale or disposition of the goods and the collection of accounts, does not raise a presumption of fraud in the transaction or render the sale fraudulent and void as against creditors, on the ground that there is an implication of the reservation of a benefit to the debtor or a beneficial use of the property transferred.⁶⁵ Whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law.⁶⁶ But if its sole purpose was to obtain services neces-

63. *Hine v. Bowe*, 114 N. Y. 350, 21 N. E. 733; *Goetter v. Smith*, 104 Ala. 481, 16 So. 534.

64. *Hine v. Bowe*, 114 N. Y. 350, 21 N. E. 733; *Royer Wheel Co. v. Fielding*, 101 N. Y. 504.

65. *N. Y.*—*Havens v. Extein*, 5 N. Y. Supp. 735; *Griffin v. Cranston*, 23 N. Y. Super. Ct. 1; *Nicholson v. Leavitt*, 6 N. Y. Super. Ct. 252.

U. S.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; *Smith v. Craft*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267, *aff'd* 17 Fed. 705.

Ga.—*Cribb v. Bagley*, 83 Ga. 105, 10 S. E. 194, it will not *per se* render the sale void.

Minn.—*Wilcox v. Lundberg*, 30 Minn. 93, 14 N. W. 365, it is not, as a matter of law, fraudulent. The question of its character as fraudulent or not is for a jury.

N. C.—*Cowan v. Phillips*, 119 N. C. 26, 25 S. E. 711.

Pa.—*Davis v. Yoder*, 173 Pa. St. 138, 33 Atl. 882. But see *Birmingham Dry Goods Co. v. Roden*, 110 Ala. 511, 18 So. 135; *Blumenthal v. Magnus*, 97 Ala. 530, 13 So. 7; *Stephens v. Reginstein*, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156.

66. *Smith v. Craft*, 123 U. S. 436, 441, 8 Sup. Ct. 196, 31 L. Ed. 267; *Lukins v. Aird*, 6 Wall. (U. S.) 78, 18 L. Ed. 750; *Harris v. Sumner*, 2

sary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid.⁶⁷

§ 11. **Reservation of right of repurchase or return of property.**—No presumption of a fraudulent intent to hinder or delay other creditors arises from a transfer of property as security to a *bona fide* creditor, whose debt is due, because of a provision of the instrument of transfer that the property shall be returned in case a certain contemplated adjustment of affairs of the debtor shall be made, which provision is favorable to other creditors,⁶⁸ nor will an agreement between debtor and creditor, made after an assignment of property, that, if the debtor could sell the property for more than a certain amount, he could have the difference, invalidate the transfer as against creditors.⁶⁹ Where a bill of sale gave the vendor a right to repurchase, within a certain time, and the testimony was conflicting as to whether an absolute sale or a transfer as security for moneys advanced was intended, in the absence of any evidence of fraud, the transaction was valid as against creditors levying on goods under execution against the vendor.⁷⁰ But an absolute conveyance by a person in failing circumstances, conditioned that the grantor may repurchase when he chooses and the grantee be repaid whatever he has expended, is fraudulent as to creditors.⁷¹ Where a debtor conveyed land to his creditor, retaining a right of redemption, with a contemporaneous agreement under which he remained in possession of part of the land, cultivating it for his own benefit,

Pick. (Mass.) 129; McClurg v. 462, *aff'g* Earle v. McCartney, 112 Lecky, 3 Penr. & W. (Pa.) 83, 23 Fed. 372.
Am. Dec. 64.

67. Smith v. Craft, *supra*; Strong v. Carrier, 17 Conn. 319; Wilcoxon v. Annesley, 23 Ind. 285; Baxter v. Wheeler, 9 Pick. (Mass.) 21.

68. McCartney v. Earle, 115 Fed.

69. In re A. L. Robertshaw Mfg. Co., 133 Fed. 566.

70. Mahler v. Schloss, 7 Daly (N. Y.), 291.

71. Shannon v. Commonwealth, 8 Serg. & R. (Pa.) 444.

the law presumes such advantage to have been the consideration for the preference, which will be thereby rendered invalid.⁷² But a conveyance by a debtor of all his property while a suit is pending against him, with a stipulation that he will repurchase the property conveyed at the same price within a certain time, if the purchaser desires it, has been held not to be conclusive evidence of fraud, but evidence of circumstances may be admitted to explain and justify the transaction.⁷³ The fact that there was an understanding between the parties to a bill of sale that the purchaser was to reconvey the property to the seller when the purchaser was paid a certain debt does not render the bill of sale void as to subsequent attaching creditors.⁷⁴ But it has been held that a conveyance by an insolvent to his father as security for a debt due him, the property to be returned when the father got his money out of it, is constructively fraudulent, and void as to other creditors.⁷⁵

§ 12. Reservation of power to appoint substitute trustee.—A deed of trust for certain creditors is not rendered fraudulent as to other creditors by the reservation therein of a power to the grantor to appoint a substitute trustee, in case of the failure of the trustee named therein, from death or any cause, to act, at least if no attempt is made to exercise the power.⁷⁶

§ 13. Reservation of exempt property.—A deed of trust to secure an existing debt is not invalidated as against creditors by the grantor's reserving in it to himself and family all exemptions and property allowed by the state constitution and laws and the bankrupt laws.⁷⁷ A reservation in an assignment for

72. *Anderson v. Fuller*, McMul. Eq. (S. C.) 27, 36 Am. Dec. 290.

73. *Barr v. Hatch*, 3 Ohio, 527.

74. *Cary-Halidy Lumber Co. v. Cain*, 70 Miss. 628, 13 So. 239.

75. *Frey v. Gessler*, 9 Pa. Cas. 509, 12 Atl. 854. See also *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785.

76. *Cook & B. Co. v. Hunt*, 18 Tex. Civ. App. 314, 45 S. W. 153.

77. *McCord v. Moore*, 52 Tenn. 734; *Farquharson v. McDonald*, 49 Tenn. 404; *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580. See also Exempt property, chap. IV, § 41, *supra*.

the benefit of creditors, by mistake of the assignor, of property as exempt, which he did not hold or control or which was not in fact exempt, does not render the assignment void, if in fact he conveys, regardless of such reservation, all his property not exempt from execution.⁷⁸

§ 14. **Secret reservations or trusts as element or evidence of fraud.**—The general rule is well established that any secret understanding or agreement for a benefit to accrue to or be reserved by the debtor, or any secret reservation in trust for the debtor of any interest, benefit or advantage, inconsistent with the terms of the conveyance or transfer of property by a debtor in failing circumstances,⁷⁹ the conveyance being absolute in terms, and such reservation not apparent on the face of the conveyance but resting wholly in parol, renders the entire transaction fraudulent and void as against creditors of the debtor injured thereby.⁸⁰ The rule applies to absolute conveyances of land,⁸¹ and

78. *Robinson v. Belt*. (Ind. T.), 51 S. W. 975.

79. *Parkman v. Welch*, 36 Mass. 231, actual insolvency of the grantor is not required, all that is necessary is that the grantor be deeply indebted.

80. *N. Y.*—*Hardt v. Deutsch*, 22 Misc. Rep. 66, 48 N. Y. Supp. 564; *Stoddard v. Butler*, 20 Wend. 507.

U. S.—*Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540; *Dent v. Ferguson*, 132 D. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; *Smith v. Craft*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267; *In re Dauchy*, 122 Fed. 688; *Howe Mach. Co. v. Claybourn*, 6 Fed. 438, while the reservation of a secret benefit on the execution of an absolute conveyance does not necessarily render the conveyance fraudulent as to creditors, the land may be charged in equity with the benefit reserved; *Burbank v. Hammond*, 4 Fed. Cas. No. 2,137, 3 Sumn.

429; *Hamilton v. Russell*, 1 Cranch, 309, 2 L. Ed. 118.

Ala.—*Davidson v. Watts Min. Car Wheel Co.*, 121 Ala. 591, 25 So. 758, a confession of judgment designed to cover up the leviable property of the debtor company; *Smith v. Hall*, 103 Ala. 235, 15 So. 525; *McDermott v. Eborn*, 90 Ala. 258, 7 So. 751; *Pritchett v. Pollock*, 82 Ala. 169, 2 So. 735; *Fellows v. Lewis*, 65 Ala. 343, 39 Am. Rep. 1; *Sims v. Gaines*, 64 Ala. 392; *Borland v. Walker*, 7 Ala. 269. See also *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704, as to rule where conveyance is based upon a valuable consideration.

Ark.—*Sparks v. Mack*, 31 Ark. 666.

Colo.—*George v. Tufts*, 5 Colo. 162; *Taub v. Swofford Bros.* Dry Goods Co., 8 Colo. App. 213, 45 Pac. 513; *Innis v. Carpenter*, 4 Colo. App. 30, 34 Pac. 1011.

Dak.—*First Nat. Bank v. Comfort*,

a conveyance of land, with a secret reservation that the vendor shall have the use and enjoyment of it for a long time without

4 Dak. 167, 28 N. W. 855.

Del.—Dutton v. Jackson, 2 Del. Ch. 86.

Fla.—Neubert v. Massman, 37 Fla. 91, 19 So. 625.

Ga.—Edwards v. Stinson, 59 Ga. 443.

Ill.—Best v. Fuller & Fuller Co., 185 Ill. 43, 56 N. E. 1077, *aff'g* 85 Ill. App. 500; Highley v. American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436, *aff'g* 86 Ill. App. 48; Beidler v. Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, *aff'g* 22 Ill. App. 538; Hurd v. Ascherman, 117 Ill. 501, 6 N. E. 160; McNeil, etc., Co. v. Hovland, 91 Ill. App. 315; Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558; Pericho v. Quinn, 52 Ill. App. 102.

Ind.—Plunkett v. Plunkett, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562; Pennington v. Clifton, 11 Ind. 162, a conveyance on secret trust is a continuing fraud, and therefore void in favor of all creditors during its continuance.

Iowa.—Parlin, etc., Co. v. Daniels, 111 Iowa, 640, 82 N. W. 1015; Brundage v. Cheneworth, 101 Iowa, 256, 70 N. W. 211, 63 Am. St. Rep. 382.

Ky.—White v. Graves, 30 Ky. 523.

Me.—Jones v. Light, 86 Me. 437, 30 Atl. 71; Sidsensparker v. Sidsensparker, 52 Me. 481, 83 Am. Dec. 527.

Md.—Spuck v. Logan, 97 Md. 152, 54 Atl. 989, 99 Am. St. Rep. 427; Brooks v. Dent, 1 Md. Ch. 523; Jones v. Slubey, 5 Harr. & J. 372.

Mass.—Plimpton v. Goodell, 143 Mass. 365, 9 N. E. 791; Oriental Bank v. Haskins, 44 Mass. 332, 37 Am. Dec. 140, a secret trust, incon-

sistent with the terms of a conveyance, is not fraud *per se* nor conclusive evidence of fraud; Parkman v. Welch, 36 Mass. 231; Cutler v. Dickinson, 25 Mass. 386. Compare Stratton v. Edwards, 171 Mass. 374, 54 N. E. 886, a conveyance in trust for the grantor, made for the purpose of protecting the property from the risks incident to business, but without any intent to contract debts and avoid them by such conveyance, is not in fraud of future creditors.

Minn.—Smith v. Conkright, 28 Minn. 23, 8 N. W. 876.

Miss.—Thompson v. Fur, 57 Miss. 478; Hunt v. Knox, 34 Miss. 655.

Mo.—Zeigler v. Maddox, 26 Mo. 575; Scudder v. Payton, 65 Mo. App. 314; Pattison v. Letton, 56 Mo. App. 325.

Neb.—Racek v. First Nat. Bank, 62 Neb. 669, 87 N. W. 542; Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. 741; Houck v. Heinzman, 37 Neb. 463, 55 N. W. 1062.

N. H.—Doucet v. Richardson, 67 Neb. 186, 29 Atl. 635; Stratton v. Putney, 63 N. H. 577, 4 Atl. 876; Putnam v. Osgood, 52 N. H. 148; Coolidge v. Melvin, 42 N. H. 510; Low v. Carter, 21 N. H. 435; Towle v. Hoit, 14 N. H. 61; Trask v. Bowers, 4 N. H. 309; Parker v. Pattee, 4 N. H. 176; Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375.

N. J.—Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518, a parol reservation accompanying a bill of sale absolute in form, though a badge of fraud, is not conclusive evidence thereof.

N. C.—Carter v. Cocke, 64 N. C.

payment of rent, the same constituting a part of the consideration, is fraudulent, although based upon a valuable consideration.⁸² That a grantor in a deed, absolute on its face, by a secret

239; *Morrison v. McNeill*, 53 N. C. 45; *Sturdivant v. Davis*, 31 N. C. 365.

N. D.—*Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014.

Ohio.—*Bowlus v. Shanabarger*, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

Pa.—*Thornburn v. Thompson*, 192 Pa. St. 298, 43 Atl. 992; *Bentz v. Rockey*, 69 Pa. St. 71; *Shaffer v. Watkins*, 7 Watts & S. 219; *McCulloch v. Hutchinson*, 7 Watts, 434, 32 Am. Dec. 776; *Passmore v. Eldridge*, 12 Serg. & R. 198.

R. I.—*Lennon v. Parker*, 22 R. I. 43, 46 Atl. 44.

S. C.—*Winsmith v. Winsmith*, 15 S. C. 611.

Tenn.—*Hornsby v. City Nat. Bank* (Ch. App. 1900), 60 S. W. 160, a parol trust in land in favor of a grantor's wife and children is fraudulent as against his creditors.

Tex.—*Schultze v. Schultze* (Civ. App. 1901), 66 S. W. 56.

Vt.—*McLane v. Johnson*, 43 Vt. 48.

Va.—*Young v. Willis*, 82 Va. 291.

Wash.—*Adams v. Dempsey*, 35 Wash. 80, 76 Pac. 538.

Wis.—*Franzke v. Hitchon*, 105 Wis. 11, 80 N. W. 931.

Eng.—*Twyne's Case*, 3 Coke, 80a, 1 Smith Lead. Cas. 1.

Can.—*Beamish v. Pomeroy*, 6 Grant Ch. (U. C.) 586.

One holding money as the secret trustee or depositary of the owner in order to keep the latter's creditors from reaching it may be liable as a garnishee at the suit of a creditor. *Feary v. Cummings*, 41 Mich. 376, 1 N. W. 946.

81. U. S.—*Lukins v. Aird*, 73 U. S. 78, 18 L. Ed. 750.

Ala.—*Deposit Bank v. Caffee*, 135 Ala. 208, 33 So. 152.

Ill.—*Bostwick v. Blake*, 145 Ill. 85, 34 N. E. 38; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Moore v. Wood*, 100 Ill. 451.

Mass.—*Rice v. Cunningham*, 116 Mass. 466.

Minn.—*Thompson v. Bickford*, 19 Minn. 17.

Neb.—*Gillespie v. Cooper*, 36 Neb. 775, 55 N. W. 302.

N. J.—*Scott v. Hartman*, 26 N. J. Eq. 89.

N. C.—*Clement v. Cozart*, 109 N. C. 173, 13 S. E. 862.

Ohio.—*Schultz v. Brown*, 3 Ohio Cir. Ct. 609, 2 Ohio Cir. Dec. 353.

Tex.—*Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806. See *Stavers v. Stavers*, 69 N. H. 158, 45 Atl. 319, where the delivery of a deed to the grantee, with a secret agreement postponing its taking effect until default in payment of a mortgage on the property by the grantor, was held not conclusive evidence of fraud.

82. *Lukins v. Aird*, 73 U. S. 78, 18 L. Ed. 750; *Page v. Francis*, 97 Atl. 379, 11 So. 736, where the rents were received for the benefit of the father and mother of the grantor; *Sims v. Gaines*, 64 Ala. 392; *Dean v. Skinner*, 42 Iowa, 418; *Macomber v. Peek*, 39 Iowa, 351; *Scott v. Hartman*, 26 N. J. Eq. 89. But where there is no secret reservation of the use of the land in part consideration for the conveyance, but an independent con-

contemporaneous writing reserved to himself a life estate in the property, is proof of legal, if not of actual, fraud as to creditors of the grantor.⁸³ The general rule above stated has also been applied to mortgages or deeds of trust of real estate,⁸⁴ but a deed of trust, to be valid, need not be so certain and definite in its terms as to exclude the possibility of a secret reservation in favor of the grantor, fraudulent and inconsistent with the avowed purposes of the parties.⁸⁵ The general rule above stated is also applicable to absolute transfers of personal property⁸⁶ and to mortgages of personalty.⁸⁷ A bill of sale absolute on its face is void as to subsequent creditors where there is a

tract or agreement to lease based upon a new consideration, this rule does not apply. *Eddy v. Wearin*, 105 Iowa, 387, 75 N. W. 177; *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648; *Stroff v. Swafford*, 81 Iowa, 695, 47 N. W. 1023.

83. *Donovan v. Dunning*, 69 Mo. 436; *Brown v. McDonald*, 1 Hill Eq. (S. C.) 297. See also *Yardley v. Sibbs*, 84 Fed. 531.

84. *N. Y.—Westfall v. Jones*, 23 Barb. 9.

Ga.—Davis v. Anderson, 1 Ga. 176.

Mo.—Roberts v. Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640.

S. C.—Winsmith v. Winsmith, 15 S. C. 611.

85. *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170.

86. *U. S.—Blythe v. Thomas*, 45 Fed. 784.

Ala.—Jordan v. Collins, 107 Ala. 572, 18 So. 137; *Sheppard v. Iverson*, 12 Ala. 97. A sale of his entire stock of goods by an insolvent debtor to one of his creditors in satisfaction of a debt admitted to be valid is not fraudulent, as against other creditors, when no secret trust is re-

served for the benefit of the debtor. *Heyer v. Bromberg*, 74 Ala. 524.

Ill.—Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; *Steere v. Bigelow*, 39 Ill. 264.

Md.—Franklin v. Claffin, 49 Md. 24.

Mo.—First Nat. Bank v. Kansas City Lime Co., 43 Mo. App. 561.

N. H.—Paul v. Crooker, 8 N. H. 288.

Pa.—Connelly v. Walker, 45 Pa. St. 449.

87. *Ala.—Roden v. Norton*, 128 Ala. 129, 29 So. 367. See also *Pugh v. Harwell*, 108 Ala. 486, 18 So. 535.

Dak.—First Nat. Bank v. Comfort, 4 Dak. 167, 28 S. W. 855.

Ind.—New v. Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; *Strut v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Neb.—Bacon v. P. Brockman Commission Co., 48 Neb. 365, 67 N. W. 304.

N. H.—Putnam v. Osgood, 51 N. H. 192, although the agreement is made after the execution of the mortgage.

Wash.—Adams v. Dempsey, 29 Wash. 155, 69 Pac. 738.

Wis.—Franzke v. Hitchon, 105 Wis. 11, 80 N. W. 931.

secret trust for the grantor, though the object of the bill of sale was to place the apparent title in the grantee, so as to prevent the grantor, who was a spendthrift, from thereafter obtaining credit on the ground of the ownership of the property covered.⁸⁸ An assignment of wages to a creditor, who collected the same and turned them over to the assignor, retaining a small part to apply on his claim, is fraudulent as against attaching creditors, whose claims antedated the assignment.⁸⁹ The fact that a chattel mortgagee verbally agrees at the time the mortgage is given that the mortgagor may sell certain of the property covered thereby for his own benefit is held in some jurisdictions not to invalidate the mortgage as to other property to which such agreement does not apply.⁹⁰ A secret trust for the purpose of defrauding the grantor's creditors will not be enforced in law or equity.⁹¹ That the interest reserved by the debtor is not of great value is immaterial; it is sufficient if it is a substantial interest in the property conveyed.⁹² The rule as stated above applies although the transfer was upon a valuable consideration,⁹³ as a sheriff's sale of property on execution.⁹⁴ A transfer of goods even to a creditor accompanied by a secret trust tends to delay and defraud creditors and so is within the letter and spirit of the statute of 13 Elizabeth.⁹⁵ A secret trust or reservation created

88. *Miller v. Furse*, 1 Bailey Eq. (S. C.) 187.

89. *Lennon v. Parker*, 22 R. I. 43, 46 Atl. 44. But the fact that an assignor is permitted by his assignee, by orders given for that purpose, to draw wages he assigned, which he immediately turned over to the assignee, does not render the assignment fraudulent and void. *Dolan v. Hughes*, 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 735.

90. *In re Soudan Mfg. Co.*, 113 Fed. 804, 51 C. C. A. 476; *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547; *Lockwood v. Harding*, 79 Ind. 129;

Davenport v. Foulke, 68 Ind. 382, 34 Am. Rep. 265. Compare *Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

91. *Gillum v. Kirksey*, 29 Ky. L. Rep. 422, 93 S. W. 591.

92. *Lukins v. Aird*, 6 Wall. (U. S.) 78, 18 L. Ed. 750; *Sparks v. Mack*, 31 Ark. 676; *Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

93. *Thompson v. Furr*, 57 Miss. 478.

94. *Bostwick v. Blake*, 145 Ill. 85, 34 N. E. 38.

95. *Connelly v. Walker*, 45 Pa. St. 449.

for the grantor may be express, or implied from extrinsic circumstances, and may be proven by parol; and, where the trust is shown, fraud is an inference of law that the court is bound to pronounce.⁹⁶ The burden is upon the contesting creditor to establish by competent evidence the fact of a secret trust or reservation for the benefit of the debtor,⁹⁷ and if the declarations of a party can, under any circumstances, be received to raise a trust or create an interest in land in another, they must be clear and explicit, and point out with certainty the subject matter and the extent of the beneficial interest.⁹⁸

§ 15. What constitutes a secret reservation or trust.—

Where a deed remained for months unrecorded, the grantor continuing to occupy and exercise acts of ownership on the land, and the grantee made an oral promise to support the grantor, there is evidence of a secret trust, and the conveyance may be avoided.⁹⁹ An assignment of securities on the agreement to pay the assignor a fixed yearly sum for his support, should he demand so much, accompanied by a written agreement by the assignee to surrender back the property to the assignor whenever the latter should demand it, neither of the instruments being recorded, constitutes a secret trust for the benefit of the assignor; and an unrecorded agreement between the parties, whereby the

96. *Rice v. Cunningham*, 116 Mass. 466; *Coolidge v. Melvin*, 42 N. H. 510.

97. *N. Y.*—*Crouse v. Frothingham*, 97 N. Y. 105; *Spiegel v. Hays*, 5 St. Rep. 879.

U. S.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374.

Ala.—*Pugh v. Harwell*, 108 Ala. 486, 18 So. 535; *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137.

Iowa.—*Jamison v. Weaver*, 87 Iowa, 72, 53 N. W. 1076.

Mich.—*Sutherland v. Danaher*, 35 Mich. 422.

W. Va.—*Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766.

98. *Crouse v. Frothingham*, 97 N. Y. 105, 112. A conveyance by a husband to the wife is not shown to have been in trust for the husband by his declaration, long after the conveyance was made, that it was made for fear the husband's grantor might set aside the sale on the ground of fraud. *Moulton v. Sturgis Nat. Bank* (Tex. Civ. App. 1901), 65 S. W. 1114.

99. *Rice v. Cunningham*, 116 Mass. 466.

assignor releases the assignee from the payment of the annuity on the agreement of the latter to maintain the former for life is a secret trust for the benefit of the assignor.¹ A conveyance of realty by a debtor to his wife without any consideration therefor, to be held for the use and benefit of herself and such debtor,² a private reservation to a husband, in a conveyance by him to his wife, of the use of the property and the rents and profits thereof for a term of years,³ constitutes a secret trust for the benefit of the debtor. A chattel mortgage on the contents of a store, which covers "such personal property as may hereafter be in said premises or may be substituted for such articles as may be sold in the course of the business," creates a secret trust for the use of the mortgagor.⁴ But a secret trust or reservation is not created by a mortgage given by the maker of a note to his surety thereon, conditioned that the former will pay the note and save the surety harmless,⁵ nor by a conveyance in trust for the wife and children of the grantor, and in trust for the grantor for life in case he survive his wife,⁶ nor by a valid preferential conveyance, although the grantee subsequently conveys the property included therein to the wife of the debtor.⁷ Where a debtor sold personalty at an agreed price all of which the buyer promised to pay to creditors, the transaction was a sale and not a transfer

1. *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

2. *Racek v. First Nat. Bank*, 62 Neb. 669, 87 N. W. 542.

3. *Deposit Bank of Frankfort v. Caffer*, 135 Ala. 208, 33 So. 152. But a conveyance by a husband to a third person to aid in paying the husband's debts, with an agreement that when they are paid the lands shall be conveyed to his wife as a home for her and the children, is not a secret trust, as regards subsequent creditors of his, merely because he shares the home thus secured. *Edgerly v. First Nat. Bank*, 30 Ill. App. 425.

4. *Spies v. Boyd*, 11 N. Y. Leg. Obs. 54.

Transactions held to constitute secret trusts.—See *Shepherd v. Iverson*, 12 Ala. 97; *Second Nat. Bank v. Yeatman*, 53 Md. 443; *Kehr v. Sichler*, 48 Mo. 96; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014; *Green v. Veder* (Tenn. Ch. App. 1900), 57 S. W. 519.

5. *Eastman v. Foster*, 49 Mass. 19.

6. *Low v. Carter*, 21 N. H. 433.

7. *Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374.

of goods in trust for the use of the grantor.⁸ But it has been held that a bill of sale, although absolute on its face, is fraudulent against the grantor's creditors, if there was a secret agreement with the grantee by which the grantor should derive an ultimate benefit out of the property, either to himself individually or in payment of debts other than his debt to the grantee.⁹ A confession of judgment by an insolvent debtor in favor of the executor of an estate in which he is interested as a devisee is void as to existing creditors because upon a secret trust in the debtor's favor.¹⁰

§ 16. **Absolute conveyance intended as security.**—The rule is maintained in some jurisdictions that an absolute conveyance of lands or a conveyance absolute on its face, but in fact intended by secret understanding or trust or secret clause of defeasance, written or verbal, as a security for a debt, either antecedent or contemporaneously contracted, when made by a debtor who is insolvent or in embarrassed circumstances, is fraudulent and void as to existing creditors, although there may be no actual fraudulent intent.¹¹ And the same rule is maintained in cer-

8. *Thompson v. Newland* (Mich), 13 Det. L. N. 320, 108 N. W. 93.

9. *Ely, etc., Dry Goods Co. v. Walker*, 78 Mo. App. 578. *Contra.*—*Jefferson County Bank v. Hummel*, 11 Colo. App. 337, 53 Pac. 286, a deed to secure a creditor made in good faith before the lien or right of any other creditor has attached, is not a conveyance in trust for the use of the grantor and therefore fraudulent, although the grantee separately agreed to apply the surplus in payment of other specific debts of the grantor.

10. *Manley v. Larkin*, 59 Kan. 660, 33 Pac. 859.

11. *Ala.*—*McDermott v. Eborn*, 90 Ala. 258, 7 So. 751; *Campbell v.*

Davis, 85 Ala. 56, 4 So. 140, it is fraudulent in law as to existing creditors; *Tryon v. Flournoy*, 80 Ala. 321, but as against subsequent creditors a fraudulent intent must be shown; *Proskauer v. People's Sav. Bank*, 77 Ala. 257; *Sims v. Gaines*, 64 Ala. 392; *Hartshorn v. Williams*, 31 Ala. 149; *Bryant v. Young*, 21 Ala. 264.

Fla.—*Neubert v. Massman*, 37 Fla. 91.

Minn.—*Smith v. Conkwright*, 28 Minn. 23, 8 N. W. 876.

Miss.—*Thompson v. Furr*, 57 Minn. 478.

Mo.—*Rock Island Nat. Bank v. Powers*, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132, a duly recorded abso-

tain jurisdictions as to transfers of personal property.¹² And the fact that the property conveyed or transferred is of less value than the debt, or that the debt was for the purchase price

lute deed, which was modified by a separate written defeasance, not recorded, is void as against a creditor of the grantor, as creating a secret trust in favor of such grantor. *Compare* Robinson v. McCune, 128 Mo. 577, 30 S. W. 156.

N. H.—Stratton v. Putney, 63 N. H. 577, 4 Atl. 876, such secret trust is void against both subsequent and existing creditors; Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Watkins v. Arms, 64 N. H. 99, 6 Atl. 92; Ladd v. Wiggins, 35 N. H. 421, 69 Am. Dec. 551; Smyth v. Carlisle, 16 N. H. 464; Badger v. Story, 16 N. H. 168; Tift v. Walker, 10 N. H. 150; Smith v. Lowell, 6 N. H. 67.

N. C.—Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Gulley v. Macy, 84 N. C. 434; Holcombe v. Ray, 23 N. C. 340, void as against subsequent as well as prior creditors; Gregory v. Perkins, 15 N. C. 50.

Can.—See Gillies v. How, 19 Grant Ch. (U. C.) 32.

Where the parties entered into a new contract in writing, a few days after the execution of a conveyance absolute on its face, by which the grantee gave the grantor a right to repurchase the property at the same price, the conveyance will not be rendered fraudulent as to creditors of the grantor therein, on the ground that it is a mortgage. Danner Land, etc., Co. v. Stonewall Ins. Co., 77 Ala. 184.

An understanding that the grantor might redeem the prop-

erty when his circumstances improved will not vitiate a conveyance in other respects unobjectionable, the only effect of such a reservation being to convert an absolute conveyance into a mortgage, or to make an unconditional a conditional sale. Glenn v. Randall, 2 Md. Ch. 220.

12. Ala.—Steiner v. Scholze, 114 Ala. 88, 21 So. 428. *Compare* Kilough v. Steele, 1 Stew. & P. 162.

Cal.—Chenery v. Palmer, 6 Cal. 119, 65 Am. Dec. 493. *Compare* Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178, the statute only applies where the debtor places property in the hands of a trustee having no beneficial interest, to hold solely for the debtor's benefit and enable him to receive and enjoy his income to the prejudice of creditors.

Ill.—Highley v. American Exch. Nat. Bank, 185 Ill. 565, 57 N. E. 436, *aff'd* 86 Ill. App. 48; Best v. Fuller & Fuller Co., 185 Ill. 43, 56 N. E. 1077, *aff'd* 85 Ill. App. 500; Beidler v. Crane, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349, assignment of a patent.

Mo.—Revercomb v. McCully, 74 Mo. App. 575; Pattison v. Letton, 56 Mo. App. 325; Molaska Mfg. Co. v. Steele, 36 Mo. App. 496.

Neb.—William B. Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. 741.

N. H.—Parker v. Pattee, 4 N. H. 176.

N. C.—Johnson v. Murchison, 60 N. C. 286; King v. Cantrel, 26 N. C. 251; Gaither v. Mumford, 4 N. C. 600. But an absolute bill of sale, ac-

of the property, does not validate the sale.¹³ A conveyance of property by an insolvent firm to one of its creditors, absolutely, with the secret agreement on the part of the grantee to reconvey to the wives of the grantors on satisfaction of his debt, is fraudulent as to creditors, and cannot be upheld as a mortgage.¹⁴ A conveyance of real estate absolute on its face, but made in fact for the purpose of securing a *bona fide* creditor, cannot be declared to be evidence of a fraudulent intent as to other creditors, where the object is shown to be one which could be sustained.¹⁵ In many jurisdictions, a contrary rule to that first stated above is held by the courts, and while, since secret trusts attending conveyances absolute in terms have always been regarded as a badge of fraud since the celebrated case of *Twyne*, a conveyance, absolute in form, of real estate, accompanied by a secret trust, understanding, or agreement, or a secret clause of defeasance, either written or verbal, is viewed with suspicion and held to be a badge or evidence of fraud, it is not conclusive or fraudulent *per se*.¹⁶ And the same rule is held in certain jurisdictions as

accompanied with a parol agreement that the vendor might redeem or repurchase by repaying the same price, is not void against creditors, where it is admitted that the sale was not intended to be a mortgage, but was *bona fide*, absolute, and for a fair price. *Newsom v. Roles*, 23 N. C. 179.

N. D.—*Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014.

13. *Pattison v. Letton*, 56 Mo. App. 325; *Molaska Mfg. Co. v. Steele*, 36 Mo. App. 496; *Parker v. Pattee*, 4 N. H. 176; *Passmore v. Eldridge*, 12 Serg. & R. (Pa.) 198. Compare *Muchmore v. Budd*, 53 N. J. L. 369, 22 Atl. 518; *Grant v. Lewis*, 14 Wis. 487, 80 Am. Dec. 785.

14. *Harris v. Buchner*, 35 App. Div. (N. Y.) 594, 55 N. Y. Supp. 172.

15. *N. Y.*—*Rigney v. Tallmadge*, 17 How. Pr. 556.

16. *U. S.*—*Gaffney v. Signaigo*, 9 Fed. Cas. No. 5,169, 1 Dill. 158; *Chickering v. Hatch*, 5 Fed. Cas. No. 2,672, 3 Sumn. 474.

Ark.—*Doswell v. Adler*, 28 Ark. 82; *McCarron v. Cassidy*, 18 Ark. 34.

Cal.—*Broughton v. Vasquez*, 73 Cal. 325, 11 Pac. 806, 14 Pac. 885.

Colo.—*McClure v. Smith*, 14 Colo. 299, 23 Pac. 786, if given in good faith it is not constructively fraudulent; *Ross v. Duggan*, 5 Colo. 85.

Conn.—Appeal of *Mead*, 46 Conn. 417. *Contra.*—*Hough v. Ives*, 1 Root, 492.

Iowa.—*Cathcart v. Grieve*, 104 Iowa, 330, 73 N. W. 835; *Brown v. Bradford*, 103 Iowa, 378, 72 N. W. 648, *Fuller v. Griffith*, 91 Iowa, 632, 60 N. W. 247; *Wright v. Mahaffey*, 76 Iowa, 96, 40 N. W. 112; *Keeder v. Murphy*, 43 Iowa, 413, a conveyance absolute in form to a creditor

to conveyances of personal property.¹⁷ In some jurisdictions it is held that a conveyance absolute in form, to a creditor of the grantor may, at the instance of other creditors of the grantor, be treated as security simply for moneys advanced, and will be deemed fraudulent and void as to the balance of the consideration.¹⁸ An absolute conveyance or transfer of real or personal

of the grantor may, at the instance of other creditors of the grantor, be treated as security simply for the moneys advanced.

Kan.—First Nat. Bank v. Jaffray, 41 Kan. 694, 21 Pac. 242.

La.—Wang v. Finnerty, 32 La. Ann. 94; Bailey v. Chase, 18 La. Ann. 732.

Me.—Wyman v. Brown, 50 Me. 139; Stevens v. Hinckley, 43 Me. 440; Gilbert v. Merrill, 12 Me. 74; Reed v. Woodman, 4 Me. 404.

Mass.—Oriental Bank v. Haskins, 44 Mass. 332, 34 Am. Dec. 140; Cutler v. Dickinson, 25 Mass. 386; Harrison v. Phillips Academy, 12 Mass. 456.

Mich.—Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Minn.—Thompson v. Bickford, 19 Minn. 17.

Miss.—Bank of Mobile v. Tishomingo Sav. Inst., 62 Miss. 250.

Neb.—Kemp v. Small, 32 Neb. 318, 49 N. W. 169.

N. J.—Adoue v. Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817, *rev'g* 50 N. J. Eq. 231, 46 Atl. 543.

Or.—Haseltine v. Espey, 13 Or. 301, 10 Pac. 423.

Tenn.—Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873; Gibbs v. Thompson, 26 Tenn. 179.

Vt.—Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264; Smith v. Onion, 19 Vt. 427; Gibson v. Seymour, 4 Vt. 518.

Wash.—Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509.

Wis.—Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; McFarlane v. Loudon, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883.

17. *N. Y.*—Curtis v. Leavitt, 15 N. Y. 9, 120.

Me.—Emmons v. Bradley, 56 Me. 333; Stevens v. Hinckley, 43 Me. 440; Ulmer v. Hills, 8 Me. 326; Reed v. Jewett, 5 Me. 96. *Compare* Thompson v. Pennell, 67 Me. 159.

Md.—Earnshaw v. Stewart, 64 Md. 513, 2 Atl. 734.

Mass.—Parsons v. Topliff, 119 Mass. 245; Glover v. Austin, 23 Mass. 209; New England Mar. Ins. Co. v. Chandler, 16 Mass. 275.

Miss.—Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628, 13 So. 229.

Neb.—Kemp v. Small, 32 Neb. 318, 49 N. W. 169.

N. J.—Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518.

Vt.—Barker v. French, 18 Vt. 460.

Va.—Didier v. Patterson, 93 Va. 534, 25 S. E. 661.

Wis.—Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Grant v. Lewis, 14 Wis. 487, 80 Am. Dec. 785.

Eng.—Wood v. Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892; Darvill v. Terry, 6 H. & N. 807, 30 L. J. Exch. 355.

18. Keeder v. Murphy, 43 Iowa,

property intended as a mortgage or as security for a debt, if it be given under circumstances showing an actual fraudulent intent on the part of the grantor or transferrer known to or participated in by the grantee or transferee, such as concealing the true nature of the transaction and claiming absolute title thereunder, or if it contains provisions that will hinder, delay, or defraud creditors, or if there is a secret agreement between the parties which will hinder, delay or defraud creditors, is void as against creditors for actual fraud.¹⁹

§ 17. **Absolute sale with reservation of surplus.**—A conveyance of land or a bill of sale or assignment of personalty made by a person indebted at the time to one of his creditors, absolute on its face, but intended to enable the grantee to sell the property and pay the debts of the grantor, rendering the surplus, if any, to the grantor, or accompanied with a private or secret agree-

413; *Wang v. Finnerty*, 32 La. Ann. 94; *Joseph M. Smith Co. v. O'Brien*, 57 N. J. Eq. 365, 41 Atl. 492; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264.

19. *Colo.*—*Innis v. Carpenter*, 4 Colo. App. 30, 34 Pac. 1011.

Ill.—*Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

Iowa.—*Fuller v. Griffith*, 91 Iowa, 632, 60 N. W. 247, concealment of true nature of conveyance; *Wright v. Mahaffey*, 76 Iowa, 96, 40 N. W. 112.

Kan.—*McCluskey v. Cubbison* (App. 1899), 57 Pac. 496, creditors attacking a bill of sale absolute on its face as fraudulent may show by parol evidence that it was intended as a mortgage and is void by reason of actual fraud.

Me.—*Wellington v. Fuller*, 38 Me. 61, a deed given as security merely, but for which nothing was paid and no security surrendered.

Mass.—*Hassam v. Barrett*, 115 Mass. 256.

Mich.—*Meigs v. Weller*, 90 Mich. 629, 51 N. W. 681, where a creditor took from his debtor absolute deeds and a bill of sale of the latter's property, giving back an instrument whereby he agreed to reconvey if the debt was paid in one year, and after garnishment proceedings were begun by other creditors against him, conveyed all of the property to a third person; and where, although there was evidence that the property was worth twice the amount of the debt, he refused to state the value of the property, or what he sold it for.

N. J.—*White v. Megill* (Ch. 1899), 18 Atl. 355.

N. C.—*Johnson v. Murchison*, 60 N. C. 286, a conveyance of property absolute on its face, and declared to be made in payment of a debt, but the supposed debt was merely an obligation, on the part of the vendor, to indemnify the vendee against an event which had not happened and might never happen.

ment, understanding, or trust that the grantee or assignee shall dispose of the property and pay the debt to himself and account for the surplus, if any, or refund the balance to the grantor or assignor is fraudulent in law and void as to other creditors.²⁰ A deed of trust executed by a debtor in embarrassed circumstances, by which a secret trust is willfully and knowingly created by the grantor and beneficiary for the purpose of concealing from creditors of the grantor a portion of his property, and ultimately to deprive them of any benefit therefrom, under cover of a conveyance to secure *bona fide* indebtedness, is fraudulent as against such creditors.²¹ If a debtor makes a sale of personal property to one of his creditors, with an understanding that out of the proceeds of a sale of the property the creditor shall retain enough to pay his own debt, and then pay certain other creditors, and then pay the balance of the proceeds over to the debtor, and this sale is made to prevent other creditors from attaching the property, it is actual fraud, and vitiates the sale as to other creditors.²²

Vt.—*Barker v. French*, 18 *Vt.* 469, although a person may take security for a debt by an absolute bill of sale of property, when it was intended only as security, yet if he claim that the purchase was absolute, and thereby seek to protect from creditors the property of the vendor, and endeavor to conceal the true nature of the transaction, it is evidence of fraud.

20. *N. Y.*—*Jackson v. Brush*, 20 *Johns.* 5.

D. C.—*Smith v. Kenny*, 1 *Mackey*, 12.

Ida.—*Johnson v. Sage*, 4 *Ida.* 758, 44 *Pac.* 641.

Ky.—*White v. Graves*, 7 *J. J. Marsh.* 523.

Miss.—*Hunt v. Knox*, 34 *Miss.* 655.

Mo.—*Scudder v. Payton*, 65 *Mo. App.* 314; *Molaska Mfg. Co. v.*

Steele, 36 *Mo. App.* 496, even though no surplus was in fact realized or could have been realized by reasonable efforts.

Neb.—*Bacon v. P. Brockman Commission Co.*, 48 *Neb.* 365, 67 *N. W.* 304; *William B. Grimes Dry Goods Co. v. Shaffer*, 41 *Neb.* 112, 59 *N. W.* 741; *Gillespie v. Cooper*, 36 *Neb.* 775, 55 *N. W.* 302.

N. H.—*Parker v. Pattee*, 4 *N. H.* 176.

N. D.—*Newell v. Wagness*, 1 *N. D.* 62, 44 *N. W.* 1014.

Pa.—*Connelly v. Walker*, 45 *Pa. St.* 449; *McCulloch v. Hutchinson*, 7 *Watts*, 434, 32 *Am. Dec.* 776.

21. *Roberts v. Barnes*, 127 *Mo.* 405, 30 *S. W.* 113, 48 *Am. St. Rep.* 640.

22. *Menton v. Adams*, 49 *Cal.* 620. A similar agreement with a creditor's agent would render the trans-

It is held in some cases that an agreement between a creditor accepting property and the debtor, or between the maker of a bill of sale and the transferee, that if more is realized from the property than is sufficient to pay the indebtedness which constituted the consideration, the surplus proceeds shall be returned to the debtor, does not constitute such a secret trust as will invalidate the transfer, in the absence of fraudulent intent, but is a circumstance tending to show that the transfer was made with intent to hinder and defraud creditors.²³ In other cases it is held that such an assignment does not of itself render the transfer fraudulent, so long as the property transferred bears a reasonable proportion to the debt provided for.²⁴

§ 18. **Reservation of right to repurchase.**—The law will not permit a debtor in failing circumstances to sell his land and convey it by deed without reservations, and yet secretly reserve to himself the equity of redemption for his own use and benefit, although there is a valuable consideration for the transfer, but such a conveyance is fraudulent and void as to his creditors.²⁵ A transfer of property, real or personal, by a debtor in failing circumstances, which, although absolute on its face, is accompanied by a secret agreement or understanding that the grantee shall reconvey the property to the grantor on repayment of the purchase money with interest,²⁶ or as soon as the grantor's debts,²⁷

action void, although the creditor may not in fact have known of the fraudulent intent. *Greensleve v. Blum*, 59 Tex. 124.

23. *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497; *St. John v. Camp*, 17 Conn. 222; *New England Mar. Ins. Co. v. Chandler*, 16 Mass. 275; *Muchmore v. Budd*, 53 N. J. L. 369, 22 Atl. 518.

24. *Rahn v. McElrath*, 6 Watts (Pa.) 151; *In re Robertshaw Mfg. Co.*, 133 Fed. 556.

25. *Neubert v. Massman*, 37 Fla. 91, 19 So. 625.

26. *Ga.*—*Ward v. Lamberth*, 31 Ga. 150.

Ill.—*Brinton v. Gerry*, 7 Ill. App. 238, it is fraudulent and void as to creditors and subsequent purchasers.

N. H.—*Winkley v. Hill*, 9 N. H. 31, 31 Am. Dec. 215, *explained and modified* in *Albee v. Webster*, 16 N. H. 362.

Pa.—*Mead v. Conroe*, 113 Pa. St. 220, 8 Atl. 374, such an agreement is not conclusive evidence of fraud.

or the debts due on the property,²⁸ have been paid and discharged, is either *prima facie* or conclusively fraudulent as against creditors of the grantor, and will be set aside at the instance of such creditors. But where the testimony is conflicting as to whether an absolute sale or a transfer as security for the moneys advanced was intended, the transaction is valid as against creditors.²⁹ A stipulation in a contract for the sale of lands that the vendor will repurchase at the same price, within a specified time, if the purchaser desires it, does not show a secret trust in his favor, rendering the sale void as against his creditors.³⁰

§ 19. **Employment of debtor.**—Where a purchase from a debtor in failing circumstances is of a business or a stock of goods in a store and an established trade, the fact that the debtor is employed, at a fair salary, to continue in charge of and manage the business, after the sale, or to assist in a clerical capacity in the manufacture and sale of the goods in stock and the collection of accounts, does not, of itself, prove the transaction fraudulent, but it is evidence to be considered by the jury upon the question of fraudulent intent and as to whether or not a

Wis.—Grant v. Lewis, 14 Wis. 487, 80 Am. Dec. 785.

Conveyance by grantor who was not indebted.—Where in an action to set aside a deed as given to defraud creditors, it appeared that the grantor's title to the premises was clouded by a tax sale; that he was a non-resident and had no other property; that the grantee, as consideration for the deed, agreed to pay the costs of litigation necessary to quiet the title in himself, and to sell the premises back to the grantor at any time within six months on repayment to him of these costs and expenses, the title to become absolute in the grantee if not so repurchased, and it was also shown that the only claim being urged against the grantor at

the time of the transfer was one which his attorney assured him was barred by the statute of limitations, it was held that the transfer was not fraudulent. Robinson v. McCune, 128 Mo. 577, 30 S. W. 156.

27. Jackson v. Marshall's Adm'r, 5 N. C. 323, 3 Am. Dec. 695; Vick v. Flowers, 5 N. C. 321; Weis v. Quinnan (Tex. 1888), 7 S. W. 804. Compare Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628, 13 So. 239, sale not rendered void as to subsequent attaching creditors.

28. Gleises v. McHatton, 14 La. Ann. 560.

29. Mahler v. Schloss, 7 Daly (N. Y.) 291.

30. Barr v. Hatch, 3 Ohio, 527.

secret trust or benefit was created or reserved for the debtor.³¹ The same rule applies where the debtor was employed by a creditor, to whom he had transferred his business, to sell the entire stock, for a large commission if he could sell the stock for a certain sum.³² But it has been held that where one of the terms of the sale of his business by an insolvent debtor is that he be retained in the management thereof at a salary, there is a benefit secured to him which renders the transaction fraudulent as against creditors;³³ but that the rule is otherwise where there was no stipulation that he was to be paid for his services,³⁴ or where the employment was in a subsequent distinct transaction, such as by a corporation subsequently organized by the purchaser.³⁵ A mortgage of a stock of merchandise given to secure a *bona fide* indebtedness, and which does not exceed its amount, is not made fraudulent as to creditors by the fact that the debtor is left in charge of the property mortgaged, with authority to sell the same and to account to the creditor for the proceeds, less the actual expenses of managing the business and a salary to the debtor.³⁶

31. *N. Y.*—Griffin v. Cranston, 23 N. Y. Super. Ct. 1; Nicholson v. Leavitt, 6 N. Y. Super Ct. 252.

U. S.—Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; In re A. L. Robertshaw Mfg. Co., 133 Fed. 566.

Ga.—Gribb v. Bagley, 83 Ga. 105, 10 S. E. 104.

Ind.—Wilcoxon v. Annesley, 23 Ind. 285.

Minn.—Wilcox v. Lundberg, 30 Minn. 93, 14 N. W. 365; Vose v. Stickney, 19 Minn. 367.

Tex.—Peters Saddlery, etc., Co. v. Schoelkopf, 71 Tex. 418, 9 S. W. 336; Van Hook v. Walton, 28 Tex. 59.

32. In re A. L. Robertshaw Mfg. Co., 133 Fed. 566; Davis v. Yoder, 173 Pa. St. 138, 33 Atl. 882, 38 Wkly.

Notes Cas. 25. Compare Bentz v. Rockey, 69 Pa. St. 71.

33. Roden v. Norton, 128 Ala. 129, 29 So. 637; Birmingham Dry Goods Co. v. Roden, 110 Ala. 511, 18 So. 135, 55 Am. St. Rep. 35; Stephens v. Regenstein, 89 Ala. 561, 8 So. 68, 18 Am. St. Rep. 156; Fuller, etc., Co. v. Gaul, 85 Ill. App. 500, *aff'd* Best v. Fuller, etc., Co., 185 Ill. 43, 56 N. E. 1077.

34. Blumenthal v. Magnus, 97 Ala. 530, 13 So. 7.

35. Henderson v. Perryman, 114 Ala. 647, 22 So. 24.

36. Red River Valley Nat. Bank v. North Star Boot & S. Co., 8 N. D. 432, 79 N. W. 880, *citing* Brackett v. Harvey, 91 N. Y. 215; Conkling v. Shelley, 28 N. Y. 360, and *distinquishing* Newell v. Wagness, 1 N. D.

§ 20. **Future support of grantor.**—Where the consideration for a conveyance is in whole or part a secret agreement, understanding, or trust for the future support of the grantor or his family, the conveyance is either *prima facie* or conclusively fraudulent and void as to existing creditors, and the question of the amount reserved to the grantor is immaterial.³⁷ Such an arrangement has been held to be a continuing fraud, and void against subsequent as well as precedent creditors.³⁸ But where the father of certain minor children conveys them land to pay a debt due by him to their mother, and it is understood and agreed that he shall look after the land, collect the rents, and apply the same to the support and education of said grantees, this does not constitute the reservation of a benefit to the grantor, such as will invalidate the conveyance at the instance of an existing creditor.³⁹ Nor does permission by a father to his daughter to live on a farm, which he had given her and which she reconveyed to him, create a trust

62. That a chattel mortgagee allowed the mortgagor to sell the property and allowed the purchaser to retain a small sum due him from the mortgagor, which might be a suitable commission to the mortgagor for making the sale, is not such evidence of fraud or collusion as will invalidate the mortgage as against subsequent attaching creditors. *Bank of Atchison County v. Shackelford*, 67 Mo. App. 475.

37. *New v. Sailors*, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; *Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857; *Graves v. Blondell*, 70 Me. 194; *Egery v. Johnson*, 70 Me. 258; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Hapgood v. Fisher*, 34 Me. 407, 56 Am. Dec. 663; *Rollins v. Mooers*, 25 Me. 192; *Welcome v. Batchelder*, 23 Me. 85; *Rice v. Cunningham*, 116 Mass. 466; *Hunt v. Knox*, 34 Miss. 655; *Smith v. Smith*, 11 N. H. 459.

An assignment of wages to secure a present indebtedness and future support is not valid as against creditors of the assignor, so as to include money paid over to the assignor out of the wages under an agreement to that effect outside of the assignment. *Robinson v. McKenna*, 21 R. I. 117, 119, 42 Atl. 510, 79 Am. St. Rep. 793, *disapproving* *Schofield v. McConnell*, 119 Mass. 368.

38. *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527. But a voluntary conveyance accompanied by an agreement on the part of the grantee to support the grantor for life may, in the absence of any intentional fraud, be valid as to subsequent creditors, although void as to existing creditors. *Bowlus v. Shanabarger*, 19 Ohio Cir. Ct. 137, 10 Ohio Cir. Dec. 167.

39. *Enfaula Nat. Bank v. Pruett*, 128 Ala. 470, 30 So. 731.

for her benefit, where there was no such agreement between the parties, and no enforceable right, interest, or privilege was reserved to her, and none would have been reserved if the transaction was in writing.⁴⁰ Though, at the time a lease to one and his son was surrendered and a lease to his wife and the son made in place thereof, the son assured him that he would be provided for, such agreement for the support is too indefinite and uncertain to be treated as part of the consideration for the transaction so as to make it fraudulent as to his creditors.⁴¹

§ 21. **Purchase at execution or other sale for benefit of debtor.**—Where, at an execution sale, one buys property for the benefit of the judgment debtor and holds it to defraud his creditors,⁴² or purchases it at the request and with the means of the judgment debtor for his benefit,⁴³ or by a fraudulent combination with the judgment debtor and others, is enabled to purchase the property for less than it is really worth, the benefit of which the judgment debtor is to reap,⁴⁴ or purchases it under a secret understanding that the property shall be held in trust for the execution debtor,⁴⁵ the transaction is not valid because the judgment was, but is fraudulent and void as to the debtor's creditors. So where the purchaser at a sale of lands by a trustee under a deed of trust is a mere figurehead and nominal purchaser assisting the judgment debtor to defraud his creditors, the sale is void both at law and in equity, and may be attacked by any person damaged by the fraud.⁴⁶ And a sale by a trustee of an insolvent's stock of goods to a creditor, who pays part in cash, of which a portion is the money of the debtor's wife, is fraudulent as to creditors and void.⁴⁷ Where a husband, acting for his wife, buys in merchan-

40. *First Nat. Bank v. Beasley*, 12 Colo. App. 313, 55 Pac. 616.

41. *McCormick Harvesting Mach. Co. v. Poudier*, 123 Iowa, 17, 98 N. W. 303.

42. *Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307.

43. *Miller v. Fraley*, 21 Ark. 22; *Clarkson v. White*, 38 Ky. 11.

44. *Stovall v. Farmers', etc., Bank*, 16 Miss. 305, 47 Am. Dec. 85.

45. *Bostwick v. Blake*, 145 Ill. 85, 34 N. E. 38.

46. *State v. McBride*, 105 Mo. 265, 15 S. W. 72.

47. *Levine v. Rouss* (Tex. Civ. App. 1899), 49 S. W. 1051.

dise at a foreclosure sale with a view of protecting the mortgagor,⁴⁸ and where there has been a simulated and pretended foreclosure,⁴⁹ the sale is fraudulent and void as to creditors. It has been held that a trust *ex maleficio* arises because of the grantor's prior relation to the property, in favor of the grantor in a trust deed, against one who purchases the same under the deed of trust, pursuant to a verbal agreement between the grantor and himself while the sale was pending that he would purchase the property and hold it for the former until he was reimbursed for the purchase price.⁵⁰

§ 22. Subsequent disposition of property by debtor in creditor's favor.—A *bona fide* creditor may, by fair contract, purchase and receive the effects of his debtor in payment of such debt, even though the known effect may be to hinder or defeat other creditors. Such a creditor, after lawfully collecting his debt, either in money or by the purchase of property, may, if he sees fit, devote the proceeds to the debtor, without subjecting himself to liability to other creditors as a trustee in his own wrong, or may convey the same to the debtor or the debtor's wife or children and the transaction does not show a secret reservation for the grantor, in the absence of proof that the property was sold for less than its value, and the conveyance cannot be set aside as fraudulent as against other creditors.⁵¹ This rule is maintained, notwithstanding the fact that the debtor may have expected that such property would be reconveyed to his wife

48. *Monarch Rubber Co. v. Bunn*, 78 Mo. App. 55.

49. *Whitney v. Leominster Sav. Bank*, 141 Mass. 85, 6 N. E. 551.

50. *Richardson v. Champion*, 143 Mo. 538, 45 S. W. 280.

See also *Collusive and fraudulent legal proceedings*, chap. II, § 9, *supra*; *Foreclosure of mortgages and deeds of trust*, *Execution and other*

judicial sales, chap. II, §§ 13, 14, *supra*.

51. *Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; *Young v. Dumas*, 39 Ala. 60; *Solomon v. C. M. Schneider & Co.*, 56 Neb. 680, 9 Am. & Eng. Corp. Cas. N. S. 740, 77 N. W. 65; *McPherson v. McPherson*, 21 S. C. 261. But see *Reynolds v. Lansford*, 16 Tex. 286,

or children, there being no agreement for such reconveyance.⁵² The same rule has been applied where an insolvent, with intent to defraud his creditors, induced his wife's relative to buy his land at an execution sale, and the relative actually and in good faith and in ignorance of the debtor's fraudulent design purchased it and had it conveyed to the debtor's wife, who was likewise innocent of the debtor's attempt to defraud.⁵³ The mere fact that a debtor confessing a judgment for a *bona fide* debt believes or knows that the creditor intends to settle the principal part of the debt upon the debtor's wife, is not sufficient evidence of fraud as against other creditors.⁵⁴

§ 23. Discharge of secret trust by subsequent agreement.—

A conveyance, originally fraudulent as against creditors, is not thereby void, but only voidable, and may be purged of fraud by matter *ex post facto* whereby the fraudulent intent is abandoned and the grant confirmed for adequate consideration.⁵⁵ Where a

holding such a conveyance *prima facie* fraudulent as to antecedent creditors.

52. Hesse v. Barrett, 41 Or. 202, 68 Pac. 751; McPherson v. McPherson, 21 S. C. 261.

53. Crawfordsville Bank v. Carter, 89 Ind. 317.

Where a father, indebted to his children on account of a guardianship to an amount exceeding a legacy, assigns in good faith such legacy in payment *pro tanto* of the demand against him, and an indebtedness for which a judgment was rendered did not exist when the assignment was made, the assignment will not be set aside as in fraud of creditors, though the beneficiaries of the assignment allowed their father to receive the larger part of the legacy, and he, on signing the lease, after the assignment, on which the judgment was obtained, gave complainant, his landlord, an order on the executors

for his interest to secure the rent. Bush v. Downey, 195 Ill. 82, 62 N. E. 868, *aff'g* 96 Ill. App. 503.

The sale by a junior mortgagee, subject to the prior mortgage, of the mortgaged property for the amount due him on his mortgage, and the subsequent resale by the purchaser to the original mortgagor, which are not shown to have been connected in any manner, are insufficient to show fraud as to the mortgagor's creditors, although the price received by the mortgagee was somewhat less than the actual value of the property. Pugh v. Harwell, 108 Ala. 486, 18 So. 535.

54. Cureton v. Doby, 10 Rich. Eq. (S. C.) 411, 73 Am. Dec. 96.

55. Oriental Bank v. Haskins, 44 Mass. 332, 37 Am. Dec. 140; Agricultural Bank v. Dorsey, 1 Freem. Ch. (Miss.) 338; Smyth v. Carlisle, 17 N. H. 417. See also Stavers v.

debtor with a view to defraud his creditors conveys goods to another who receives them under such circumstances of fraud as would have fixed him as trustee, but before the service of process upon him, the purchaser had, by the order of the vendor, *bona fide* paid or assumed to pay, on account of the goods, debts of the vendor to the full value of the goods, he cannot afterwards be held as trustee of the vendor.⁵⁶ In the case of a fraudulent conveyance and assignment it is competent for the parties thereto to subsequently make a new and independent agreement for a sufficient valuable consideration, whereby the grantee or assignee shall be obligated to hold the property in trust for the grantor or assignor, but such agreement must be open and notorious and made in good faith to establish a trust in the property, otherwise it will be but attempting to create anew a secret trust already condemned by the statute.⁵⁷ Where a creditor holds a chattel mortgage upon the property of his debtor which is void as against other creditors on account of an illegal verbal agreement whereby a benefit is reserved to the debtor, but before the rights of such other creditors have become fixed, or any action has been taken by them to disaffirm the mortgage or obtain any lien upon the debtor's property, the debtor voluntarily transfers the possession of his property to the creditor as security for the indebtedness, this latter transfer is not invalidated by the voidable character of the original mortgage.⁵⁸ While a mortgagee cannot enforce a void chattel mortgage against the creditors of the mortgagor, yet if the mortgagor treats it as void and, before the

Stavers, 69 N. H. 158, 45 Atl. 319. See Purging conveyance of fraud by matter *ex post facto*, chap. III, § 7, *supra*.

56. Thomas v. Goodwin, 12 Mass. 140; Hutchins v. Sprague, 4 N. H. 69, 17 Am. Dec. 439. See also Albee v. Webster, 16 N. H. 362.

57. Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642, Songer v. Partridge, 107 Ill. 529, where,

after a deed had been set aside as fraudulent as to creditors, the grantor surrendered the notes given therefor, the grantee agreeing to cancel the deed, this agreement might be enforced in equity, as it was not tainted with the fraud of the first transaction. See also Parker v. Tiffany, 52 Ill. 286.

58. Hardt v. Deutsch, 30 App. Div. (N. Y.) 589, 52 N. Y. Supp. 335.

creditors obtain a lien, transfers the property to the mortgagee in payment of the debt, the transaction will be legal although constituting a preference.⁵⁹ Where a firm sold its stock to the wife of a partner, the business thereafter being carried on for her by her husband, and later the wife and husband sold the property for value to the plaintiff, the joinder of the husband in the sale to plaintiff and the delivery of the possession to him destroyed any rights of creditors to subject the property on the ground that the sale thereof by the firm was fraudulent for lack of change of possession and that plaintiff purchased with knowledge thereof.⁶⁰

- 59.** Bowdish v. Page, 153 N. Y. 128 N. Y. 1; Mandeville v. Avery, 108, 47 N. E. 45; Stephens v. Perrine, 124 N. Y. 376.
143 N. Y. 476; Karst v. Kane, 136 N. Y. 316; Tremaine v. Mortimer, **60.** Mandigo v. Healey, 69 N. H. 94, 45 Atl. 318.

CHAPTER XI.

PREFERENCES TO CREDITORS.

- Section 1. Right to prefer creditor and validity of transaction in general.
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Section 1. Right to prefer creditor and validity of transaction in general.—The rule is well settled upon abundant authority that, in the absence of statutory restrictions, an insolvent debtor has the right to sell and transfer the whole or any portion

of his property to one or more of his creditors in payment of or to secure his debts, when that is his honest purpose, although the effect of the sale or transfer would be to place his property beyond the reach of his other creditors and render their debts uncollectible. A debtor in failing circumstances, or insolvent, may *bona fide* prefer one creditor or another, by paying his debt or conveying in trust so much of his property as will suffice for such payment, and a conveyance of property by a debtor in payment of a debt, thereby leaving nothing for his other creditors, is valid, provided the debt is *bona fide* and enforceable, the payment absolute, and, if made in property, not materially in excess of his debt, and no pecuniary advantage is secured to the debtor. This right of disposition existed at common law as an incident to the right of property, and was as complete and perfect as the right to acquire and enjoy it. The settled rule is but a restatement of the doctrine of the common law.¹ Under this

1. N. Y.—Dodge v. McKechnie, 156 N. Y. 514, 51 N. E. 268; Delaney v. Valentine, 154 N. Y. 692, 49 N. E. 65; Tompkins v. Hunter, 149 N. Y. 117, 43 N. E. 532; Galle v. Tode, 148 N. Y. 270, 42 N. E. 673, *aff'd* 74 Hun, 542, 26 N. Y. Supp. 633; Maass v. Falk, 146 N. Y. 34, 40 N. E. 504; Abegg v. Bishop, 142 N. Y. 286, 36 N. E. 1058; Central Nat. Bank v. Seligman, 138 N. Y. 435, 34 N. E. 196; Talcott v. Harder, 119 N. Y. 536, 23 N. E. 1056; Fuller Electrical Co. v. Lewis, 101 N. Y. 674, 5 N. E. 437; Murphy v. Briggs, 89 N. Y. 446; Spaulding v. Strange, 37 N. Y. 135; Seymour v. Wilson, 19 N. Y. 417; Leavitt v. Blatchford, 17 N. Y. 521; Lowther v. Rader, 102 N. Y. Supp. 929; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203; Hoffman v. Susemihl, 15 App. Div. 405, 44 N. Y. Supp. 52; Drury v. Wilson, 4 App. Div. 232, 38 N. Y. Supp. 538; Gomez v. Hagaman, 84

Hun, 148, 32 N. Y. Supp. 453; London v. Martin, 79 Hun, 229, 29 N. Y. Supp. 396, *aff'd* 149 N. Y. 586, 44 N. E. 1125; Victor v. Levy, 72 Hun, 263, 25 N. Y. Supp. 644, *aff'd* 148 N. Y. 739, 42 N. E. 726; Bishop v. Stebbins, 41 Hun, 243; Swift v. Hart, 35 Hun, 128; Jewett v. Noteware, 30 Hun, 194; Hale v. Stewart, 7 Hun, 591; Archer v. O'Brien, 7 Hun, 146; Auburn Exch. Bank v. Fitch, 48 Barb. 344; Brett v. Catlin, 47 Barb. 404; Carpenter v. Muren, 42 Barb. 300; Duncel v. Failing, 1 Silv. Sup. 543, 5 N. Y. Supp. 504; Sweetser v. Smith, 5 N. Y. Supp. 378, 22 Abb. N. Cas. 319; Citizens' Nat. Bank v. Riddell, 2 N. Y. Supp. 331; Hauslet v. Vilmar, 2 Abb. N. Cas. 222; Laidlaw v. Gilmore, 47 How. Pr. 67; Waterbury v. Sturtevant, 18 Wend. 353; Wilder v. Winne, 6 Cow. 284; Murray v. Riggs, 15 Johns. 571; Phoenix v. Dey, 5 Johns. 412; Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364;

doctrine it has been held that the right of a debtor to devote his

Williams v. Brown, 4 Johns. Ch. 682; *McMenomy v. Roosevelt*, 3 Johns. Ch. 446; *Hendricks v. Robinson*, 2 Johns. Ch. 283, 17 Johns. 438.

U. S.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Jewell v. Knight*, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; *Peoples' Savings Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754; *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Tompkins v. Wheeler*, 16 Pet. 106, 10 L. Ed. 903; *Clark v. White*, 12 Pet. 178, 9 L. Ed. 1046; *Magniac v. Thompson*, 7 Pet. 348, 8 L. Ed. 709; *Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522, 11 Wheat. 78, 6 L. Ed. 423; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107; *Kemp v. National Bank of Republic*, 109 Fed. 48, 48 C. C. A. 213; *Ontario Bank v. Hurst*, 103 Fed. 231, 43 C. C. A. 193; *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 948, 42 C. C. A. 106; *Voorhees v. Balnton*, 83 Fed. 234; *Wilson v. Jones*, 76 Fed. 484; *Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353; *Williams v. Simons*, 70 Fed. 40, 16 C. C. A. 628; *Strauss v. Abrahams*, 32 Fed. 310; *Hills v. Stockwell, etc.*, *Furniture Co.*, 23 Fed. 432; *Kellog v. Richardson*, 19 Fed. 70; *Smith v. Craft*, 12 Fed. 856, 11 Biss. 347, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267; *Simms v. Morse*, 2 Fed. 325, 4 Hughes, 579; *Walker v. Adair*, 29 Fed. Cas. No. 17,064, 1 Bond, 158.

Ala.—*Rike v. Ryan* (1906), 41 So. 959; *First Nat. Bank v. Acme White Lead, etc., Co.*, 123 Ala. 344, 26 So. 354; *Inman v. Schloss*, 122 Ala. 461, 25 So. 739; *Davidson v. Kahn*, 116 Ala. 427, 22 So. 539; *Goetter v. Norman*, 107 Ala. 585, 19 So. 56; *Bray v. Ely*, 105 Ala. 553, 17 So. 180; *Goetter v. Smith*, 104 Ala. 481, 16 So. 534; *Schloss v. McGuire*, 102 Ala. 626, 15 So. 275; *Fargason v. Hall*, 99 Ala. 209, 13 So. 302; *Dawson v. Flash*, 97 Ala. 539, 12 So. 67; *Lathrop-Hatten Lumber Co. v. Bessemer Sav. Bank*, 96 Ala. 350, 11 So. 418; *Pollock v. Meyer*, 96 Ala. 172, 11 So. 385; *Ellison v. Moses*, 95 Ala. 221, 11 So. 347; *First Nat. Bank v. Smith*, 93 Ala. 97, 9 So. 548; *Harris v. Powell*, 93 Ala. 59, 9 So. 541; *Chipman v. Stern*, 89 Ala. 207, 7 So. 409; *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736, 6 So. 703; *Carter v. Coleman*, 84 Ala. 257, 4 So. 151; *Wood v. Moore*, 84 Ala. 253, 3 So. 912; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 389; *Levy v. Williams*, 79 Ala. 171; *Moog v. Farley*, 79 Ala. 246; *Hodges v. Coleman*, 76 Ala. 103; *Sgealy v. Edwards*, 75 Ala. 411; *Heyer v. Bromberg*, 74 Ala. 524; *Chamberlain v. Dorrance*, 69 Ala. 40; *Warren v. Jones*, 68 Ala. 449; *Turner v. McFee*, 61 Ala. 468; *Perry Ins., etc., Co. v. Foster*, 58 Ala. 502, 29 Am. Rep. 779; *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; *Young v. Dumas*, 39 Ala. 60; *Borland v. Mayo*, 8 Ala. 104; *Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86; *Williams v. Jones*, 2 Ala. 314.

Ark.—*Gilkerson-Sloss Commission Co. v. Carnes*, 56 Ark. 414, 19 S. W. 1061; *Goodbar v. Locke*, 56 Ark. 314, 19 S. W. 924; *Sparks v. Mack*, 31

whole estate to the claims of one or more creditors results from

Ark. 666; *Doswell v. Adler*, 28 Ark. 82; *Cox v. Fraley*, 26 Ark. 20.

Cal.—*Merced Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393; *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439; *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323; *Dyer v. Bradley*, 89 Cal. 557, 26 Pac. 1103; *Saunderson v. Broadwell*, 82 Cal. 132, 23 Pac. 36; *Dean v. Grimes*, 72 Cal. 442, 14 Pac. 178; *Ross v. Sedgwick*, 69 Cal. 247, 10 Pac. 400; *Wood v. Franks*, 67 Cal. 32, 7 Pac. 50; *Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Wheaton v. Neville*, 19 Cal. 41; *Randall v. Buffington*, 10 Cal. 491; *Dana v. Stanford*, 10 Cal. 269.

Colo.—*Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Campbell v. Colorado Coal, etc., Co.*, 9 Colo. 60, 10 Pac. 248; *Burr v. Clement*, 9 Colo. 1, 7 Pac. 633. *Compare* *Schideler v. Fisher*, 13 Colo. App. 106, 57 Pac. 864.

Conn.—*Warner Glove Co. v. Jennings*, 58 Conn. 74, 19 Atl. 239; *Smith v. Skeary*, 47 Conn. 47; *Kirtland v. Snow*, 20 Conn. 23.

Del.—*Slessinger v. Topkis*, 1 Marv. 140, 40 Atl. 717; *Stockley v. Horsey*, 4 Houst. 603; *Wharton v. Clements*, 3 Del. Ch. 209.

D. C.—*Barnard v. Life Ins. Co.*, 4 Mackey, 63; *Clark v. Krause*, 2 Mackey, 559.

Fla.—*McKeown v. Coagler*, 18 Fla. 866; *Holbrook v. Allen*, 4 Fla. 87.

Ga.—*Simms v. Tidwell*, 98 Ga. 686, 25 S. E. 555; *Comer v. Allen*, 72 Ga. 1; *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136; *Savannah Bank v. Planters' Bank*, 22 Ga. 466; *Lavender v. Thomas*, 18 Ga. 668; *McWhorter v. Wright*, 5 Ga. 555;

Cameron v. Scudder, 1 Ga. 204; *Davis v. Anderson*, 7 Ga. 176; *Eastman v. McAlpin*, 1 Ga. 157.

Ill.—*Fabian v. Traeger*, 215 Ill. 220, 74 N. E. 131, *aff'g* 117 Ill. App. 176; *Murray Nelson Co. v. Leiter*, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142, *aff'g* 93 Ill. App. 176; *Williams v. Andrew*, 185 Ill. 98, 56 N. E. 1041, *aff'g* 84 Ill. App. 289; *Dueber Watch Case Mfg. Co. v. Young*, 155 Ill. 226, 40 N. E. 582, *aff'g* 54 Ill. App. 383; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Hulse v. Mershon*, 125 Ill. 52, 17 N. E. 50; *Wood v. Clark*, 121 Ill. 359, 12 N. E. 271, *aff'g* 21 Ill. App. 464; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Chicoga, etc., R. Co. v. Watson*, 113 Ill. 195; *Welsch v. Werschem*, 92 Ill. 115; *Francis v. Rankin*, 84 Ill. 169; *Morris v. Tillson*, 81 Ill. 607; *Hessing v. McCloskey*, 37 Ill. 341; *Funk v. Staats*, 24 Ill. 633; *Cooper v. McClun*, 16 Ill. 435; *Cross v. Bryant*, 3 Ill. 36; *German-American Nat. Bank v. Hoffman*, 120 Ill. App. 363; *Eickstaedt v. Moses*, 105 Ill. App. 634; *Spalding v. Heideman*, 96 Ill. App. 405; *Cooke v. Peter*, 93 Ill. App. 1; *Wickler v. People*, 68 Ill. App. 282; *Taylor v. Smith*, 68 Ill. App. 109; *Oakford v. Dunlap*, 63 Ill. App. 498; *Locke v. Duncan*, 47 Ill. App. 110; *Stainbrook v. Duncan*, 45 Ill. App. 344; *Sweet v. Scherber*, 42 Ill. App. 237; *Weir v. Dustin*, 28 Ill. App. 605; *Chicago Stamping Co. v. Hanchett*, 25 Ill. App. 198; *Holbrook v. First Nat. Bank*, 10 Ill. App. 140; *Storey v. Agnew*, 2 Ill. App. 353.

Ind.—*Owens v. Gascho*, 154 Ind. 225, 56 N. E. 224; *Levering v. Bimel*,

that absolute ownership which every man claims over that which

146 Ind. 545, 45 N. E. 775; Rockland Co. v. Summerville, 139 Ind. 695, 39 N. E. 307; Thomas v. Johnson, 137 Ind. 244, 36 N. E. 893; Dice v. Irvin, 110 Ind. 561, 11 N. E. 488; O'Donald v. Constant, 82 Ind. 212; O'Connor v. Coats, 79 Ind. 596; Wilcoxon v. Annesley, 23 Ind. 285; Wynne v. Glidewell, 17 Ind. 446; Jones v. Gott, 10 Ind. 240; Stewart v. English, 6 Ind. 176; Anderson v. Smith, 5 Blackf. 395.

Iowa.—Sly v. Bell (1906), 108 N. W. 227; Atkinson v. McNider (1905), 105 N. W. 504; Thompson v. Zuckmayer (1903), 94 N. W. 476; Meredith v. Schaap (1901), 85 N. W. 628; First Nat. Bank v. Garretson, 107 Iowa, 196, 77 N. W. 856; Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835; Johnson v. Johnson, 101 Iowa, 405, 70 N. W. 598; Stroff v. Swafford, 81 Iowa, 695, 47 N. W. 1023; Loomis v. Stewart, 75 Iowa, 387, 39 N. W. 660; Southern White Lead Co. v. Haas, 73 Iowa, 399, 33 N. W. 657, 35 N. W. 494; Aulman v. Aulman, 71 Iowa, 124, 3 N. W. 240, 60 Am. Rep. 783; Garrett v. Burlington Plow Co., 70 Iowa, 597, 29 N. W. 395, 59 Am. Rep. 461; Farwell v. Howard, 26 Iowa, 381; Davis v. Gibson, 24 Iowa, 257; Lampson v. Arnold, 19 Iowa, 479; Hutchinson v. Watkins, 17 Iowa, 475; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137; Cowles v. Ricketts, 1 Iowa, 582.

Kan.—Smith-McCord Dry Goods Co. v. Carson, 59 Kan. 295, 52 Pac. 880; Hasie v. Connor, 53 Kan. 713, 37 Pac. 128; Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; Lewis v.

Hughes, 49 Kan. 23, 30 Pac. 177; First Nat. Bank v. Ridenour, 46 Kan. 707, 718, 27 Pac. 150, 26 Am. St. Rep. 167; Bliss v. Couch, 46 Kan. 400, 26 Pac. 706; Voorhis v. Michaelis, 45 Kan. 255, 25 Pac. 592; Tootle v. Coldwell, 30 Kan. 125, 1 Pac. 329; Randall v. Shaw, 28 Kan. 419; Bishop v. Jones, 28 Kan. 680; Arn v. Hoersman, 26 Kan. 413; Campbell v. Warner, 22 Kan. 604; Avery v. Eastes, 18 Kan. 505; Cuendet v. Lahmer, 16 Kan. 527; Pettyjohn v. Newhart, 7 Kan. App. 64, 51 Pac. 969.

Ky.—Whitehead v. Woodruff, 74 Ky. 209; Short v. Tinsley, 58 Ky. 397, 71 Am. Dec. 482; Kennaird v. Adams, 50 Ky. 102; Worland v. Kimberlin, 45 Ky. 608, 44 Am. Dec. 785; Reinhard v. Commonwealth Bank, 45 Ky. 252; Young v. Stallings, 44 Ky. 307; Marshall v. Hutchison, 44 Ky. 298; Ford v. Williams, 42 Ky. 550; Bergen v. Farmers', etc., Bank, 8 Ky. L. Rep. 613; Commonwealth v. Campbell, 7 Ky. L. Rep. 746; Beard v. Runyan, 6 Ky. L. Rep. 514.

La.—United States v. United States Bank, 8 Rob. 262.

Me.—Hanscom v. Buffum, 66 Me. 246; Ferguson v. Spear, 65 Me. 277; French v. Motley, 63 Me. 326; Hartshorn v. Eames, 31 Me. 93.

Md.—Thompson v. Williams (1905), 60 Atl. 26; Baltimore City Com. Bank v. Kearns (1905), 59 Atl. 1010; Stockbridge v. Franklin Bank, 86 Md. 189, 37 Atl. 645; Nicholson v. Schmucker, 81 Md. 459, 32 Atl. 182; Totten v. Brady, 54 Md. 170; Rich v. Levy, 16 Md. 74; Glenn v. Grover, 3 Md. 212; Wheeler v.

is his own,² and that if the right of giving preferences should be

Stone, 4 Gill, 38; Cole v. Albers, 1 Gill, 412; State v. State Bank, 6 Gill & J. 205, 26 Am. Dec. 561; Hickley v. Farmers', etc., Bank, 5 Gill & J. 377; Anderson v. Tydings, 3 Md. Ch. 167, 8 Md. 427, 63 Am. Dec. 708; Powles v. Dilley, 2 Md. Ch. 119, 9 Gill, 222; Stewart v. Union Bank, 2 Md. Ch. 58, 7 Gill, 439; Malcolm v. Hall, 1 Md. Ch. 172.

Mass.—Traders' Nat. Bank v. Steere, 165 Mass. 387, 43 N. E. 189; Sawyer v. Levy, 162 Mass. 190, 38 N. E. 365; Train v. Kendall, 137 Mass. 366; First Nat. Bank v. Smith, 133 Mass. 26; Atlantic Nat. Bank v. Tavener, 130 Mass. 407; Giddings v. Sears, 115 Mass. 505; Banfield v. Whipple, 96 Mass. 13; Burt v. Perkins, 75 Mass. 317; Green v. Tanner, 49 Mass. 411; New England Mar. Ins. Co. v. Chandler, 16 Mass. 275; Harrison v. Phillips Academy, 12 Mass. 456; Thomas v. Goodwin, 12 Mass. 140; Widgery v. Haskell, 5 Mass. 144, 4 Am. Dec. 41; Hatch v. Smith, 5 Mass. 42.

Mich.—Geer v. Traders' Bank, 132 Mich. 215, 93 N. W. 437; Michigan Trust Co. v. Comstock, 130 Mich. 572, 90 N. W. 331; Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098; Belding Sav. Bank v. Moore, 118 Mich. 150, 76 N. W. 368; Beckman v. Noble, 115 Mich. 523, 73 N. W. 803; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721; Sheldon v. Mann, 85 Mich. 265, 48 N. W. 573; Dalton v. Stiles, 74 Mich. 726, 42 N. W. 169; Eureka Iron, etc., Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834; Whitfield v. Stiles, 57 Mich. 410, 24 N. W. 119; Jordan v. White,

38 Mich. 253; Hill v. Bowman, 35 Mich. 191; People v. Bristol, 35 Mich. 28; How v. Camp, Walk. 427.

Minn.—Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Berry v. O'Connor, 33 Minn. 29, 21 N. W. 840; Smith v. Deidrick, 30 Minn. 60, 14 N. W. 262; Vose v. Stickney, 19 Minn. 367.

Miss.—Harris v. Sledge (1897), 21 So. 783; Holberg v. Jaffray, 64 Miss. 746, 2 So. 168; Hyman v. Stadler, 63 Miss. 362; Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353; Eldridge v. Phillipson, 58 Miss. 270; Savage v. Dowd, 54 Miss. 728; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Stanton v. Green, 34 Miss. 576; Herrick v. Henderson, Walk. 485.

Mo.—Wood v. Porter, 179 Mo. 56, 77 S. W. 762; Wall v. Beedy, 161 Mo. 625, 61 S. W. 864; Crothers v. Busch, 153 Mo. 606, 55 S. W. 149; Bangs Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923; Kingman v. Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282, 51 S. W. 727; Alberger v. National Bank of Commerce, 123 Mo. 313, 27 S. W. 657; Jaffrey v. Mathews, 120 Mo. 317, 25 S. W. 187; Alberger v. White, 117 Mo. 347, 23 S. W. 92; Schroeder v. Bobbitt, 108 Mo. 289, 18 S. W. 1093; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564; Forrester v. Moore, 77 Mo. 651; Shelley v. Boothe, 73 Mo. 74, 39 Am. Rep. 481; Henderson v. Henderson, 55 Mo. 534; Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212; Murray v. Cason, 15 Mo. 378; Bell v. Thompson, 3 Mo. 84; Scott Hardware Co. v. Riddle, 84 Mo. App. 275; Sammons v. O'Neill, 60 Mo. App. 530;

denied, while a man retains his property in his own hands, he

Smith v. National R., etc., Exposition Assoc., 47 Mo. App. 462; *W. W. Kendall Boot, etc., Co. v. Bain*, 46 Mo. App. 581; *Deering v. Collins*, 38 Mo. App. 80; *State v. Excelsior Distilling Co.*, 20 Mo. App. 21; *Gaff v. Stern*, 12 Mo. App. 115.

Mont.—*Teitig v. Boesman*, 12 Mont. 404, 31 Pac. 371.

Neb.—*Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527; *Bennett v. McDonald*, 59 Neb. 234, 80 N. W. 826; *Tackaberry v. Gilmore*, 57 Neb. 450, 78 N. W. 32; *Smith v. Bowen*, 51 Neb. 245, 70 N. W. 949; *Grand Island Banking Co. v. Costello*, 45 Neb. 119, 63 N. W. 376; *Robinson Notion Co. v. Foote*, 42 Neb. 156, 60 N. W. 316; *Hunt v. Huffman*, 41 Neb. 244, 59 N. W. 889; *Meyer v. Union Bag, etc., Co.*, 41 Neb. 67, 59 N. W. 696; *John V. Farwell Co. v. Wright*, 38 Neb. 445, 56 N. W. 984; *Jones v. Loree*, 37 Neb. 816, 56 N. W. 390; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 800, 56 N. W. 389; *Kavanaugh v. Oberfelder*, 37 Neb. 647, 56 N. W. 316; *Costello v. Chamberlain*, 36 Neb. 45, 53 N. W. 1034; *Brown v. Williams*, 34 Neb. 376, 51 N. W. 851; *Davis v. Scott*, 27 Neb. 642, 43 N. W. 407; *Elwood v. May*, 24 Neb. 373, 38 N. W. 793; *Rothell v. Grimes*, 22 Neb. 526, 35 N. W. 392.

N. H.—*Osgood v. Thorne*, 63 N. H. 375; *Buffum v. Green*, 5 N. H. 71, 20 Am. Dec. 562.

N. J.—*Tillou v. Britton*, 9 N. J. L. 120; *Thompson v. Williamson*, 67 N. J. Eq. 212, 58 Atl. 602; *Green v. McCrane*, 55 N. J. Eq. 436, 37 Atl. 318; *Low v. Wortman*, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586; *Uhl v.*

Beatty (Ch. 1885), 3 Atl. 524; *Essex v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391; *Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 13; *Coley v. Coley*, 14 N. J. Eq. 350; *Jones v. Naughtright*, 10 N. J. Eq. 298; *Garr v. Hill*, 9 N. J. Eq. 210.

N. C.—*Guggenheimer v. Brookfield*, 90 N. C. 232; *Cheek v. Davis*, 26 N. C. 284; *Hafner v. Irwin*, 23 N. C. 490; *Sellers v. Bryan*, 17 N. C. 358.

N. D.—*Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60; *Cutter v. Pollock*, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377.

Ohio.—*Stevenson v. Agry*, 7 Ohio, 247; *Barr v. Hatch*, 3 Ohio, 527; *Sack v. Hemann*, 6 Ohio Dec. 1104, 10 Am. L. Rec. 483; *Grote v. Meyer*, 6 Ohio Dec. 1025, 9 Am. L. Rec. 623; *Hauel v. Mintzer*, 1 Handy, 375.

Okla.—*Brittain v. Burnham*, 9 Okla. 522, 60 Pac. 241; *Jaffray v. Wolfe*, 1 Okla. 312, 33 Pac. 945.

Or.—*Hesse v. Barrett*, 41 Or. 202, 68 Pac. 751; *Ladd v. Johnson*, 32 Or. 195, 49 Pac. 756; *Sabin v. Wilkins*, 31 Or. 450, 48 Pac. 425, 37 L. R. A. 465; *Inman v. Sprague*, 30 Or. 321, 47 Pac. 826; *Marquam v. Sengfelder*, 24 Or. 2, 32 Pac. 676; *Kruse v. Prindle*, 8 Or. 158.

Pa.—*Snayberger v. Fahl*, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; *Candee's Appeal*, 191 Pa. St. 644, 43 Atl. 1093; *Penn Plate Glass Co. v. Jones*, 189 Pa. St. 290, 42 Atl. 189; *Braden v. O'Neill*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *Kitchen v. McCloskey*, 150 Pa. St. 376, 24 Atl. 638, 30

would so far lose the dominion over his own that he could not pay

Am. St. Rep. 811; Lake Shore Banking Co. v. Fuller, 110 Pa. St. 156, 1 Atl. 731; Walker v. Marine Nat. Bank, 98 Pa. St. 574; Bentz v. Rockey, 69 Pa. St. 71, 77; Keen v. Kleckner, 42 Pa. St. 529; York County Bank v. Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Uhler v. Maulfair, 23 Pa. St. 481; Covanhoven v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Worman v. Wolfersberger, 19 Pa. St. 59; Davis v. Charles, 8 Pa. St. 82; Blakley's Appeal, 7 Pa. St. 449; Russell's Appeal, 2 Walk. 363; Wilt v. Franklin, 1 Binn. 502, 2 Am. Dec. 474; In re Weldon's Estate, 31 Pa. Super. Ct. 47; Meyers v. Meyers, 24 Pa. Super. Ct. 603; Harman v. Reese, 1 Browne, 11; Hammett v. Harrison, 1 Phila. 349.

R. I.—Coates v. Wilson, 20 R. I. 106, 37 Atl. 537; Elliott v. Benedict, 13 R. I. 463.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Sloane v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St. Rep. 551; Perkins v. Douglass, 52 S. C. 129, 29 S. E. 400; Magovern v. Richard, 27 S. C. 272, 3 S. E. 340; McPherson v. McPherson, 21 S. C. 261; Thorpe v. Thorpe, 12 S. C. 154; Smith v. Henry, 1 Hill, 16; Cureton v. Doby, 10 Rich. Eq. 411, 73 Am. Dec. 96; Bird v. Aitken, Rice Eq. 73; Maples v. Maples, Rice Eq. 300.

S. D.—Church v. Foley, 10 S. D. 74, 71 N. W. 759; Jewett v. Downs, 6 S. D. 319, 60 N. W. 76; Sandwich Mfg. Co. v. Max, 5 S. D. 125, 58 N. W. 14, 24 L. R. A. 524.

Tenn.—Nelson v. Kinney, 93 Tenn. 428, 25 S. W. 100; Bennet v. Union Bank, 24 Tenn. 612; Warren v. Hin-

son (Ch. App. 1899), 52 S. W. 498; McGrew v. Hancock (Ch. App. 1899), 52 S. W. 500; Feder v. Erwin (Ch. App. 1896), 38 S. W. 446, 36 L. R. A. 335.

Tex.—Wallis v. Schneider, 79 Tex. 479, 15 S. W. 492; Owens v. Clark, 78 Tex. 547, 15 S. W. 101; Black v. Vaughan, 70 Tex. 47, 7 S. W. 604; Oppenheimer v. Halff, 68 Tex. 409, 4 S. W. 562; Scott v. McDaniel, 67 Tex. 315, 3 S. W. 291; Smith v. Whitfield, 67 Tex. 124, 2 S. W. 822; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; Ellis v. Valentine, 65 Tex. 532; Lewy v. Fischl, 65 Tex. 311; Greenleve v. Blum, 59 Tex. 124; Iglehart v. Willis, 58 Tex. 306; Frazer v. Thatcher, 49 Tex. 26; Thornton v. Tandy, 39 Tex. 544; Moore v. Robinson (Civ. App. 1903), 75 S. W. 890; Bowie v. Hedrick (Civ. App. 1896), 35 S. W. 317; Scarborough v. Hilliard (Civ. App. 1894), 28 S. W. 231; Martin-Brown Co. v. Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Reynolds v. Weinman (Civ. App. 1894), 25 S. W. 33; Butler v. Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487; California Bank v. Marshall, 1 Tex. Civ. App. 704, 23 S. W. 246; Loeb v. Leon, 2 Tex. Unrep. Cas. 445; Williams v. Perry, 3 Tex. App. Civ. Cas., § 209; Numsen v. Ellis, 3 Tex. App. Civ. Cas., § 134; Gamble v. Talbot, 2 Tex. App. Civ. Cas., § 729; Thompson v. Hervey, 2 Tex. App. Civ. Cas., § 506.

Utah.—Henderson v. Adams, 15 Utah, 30, 48 Pac. 398.

Vt.—Marsh v. Davis, 24 Vt. 363; Morse v. Slason, 13 Vt. 296; Lyon v. Rood, 12 Vt. 233.

Va.—Johnson v. Lucas, 103 Va. 36, 48 S. E. 497; Barton v. Brent, 87

anybody, because whoever he paid would receive a preference.³ The tests of the validity of a conveyance are, therefore, said to turn not upon the right of a creditor to prefer, nor on the failure of the nonpreferred creditor to secure, his claim, but upon the honesty of the parties to the transaction in simply giving and receiving a preference, and the absence of any intent to secure a benefit for the debtor or to hinder or delay his other creditors.⁴

Va. 385, 13 S. E. 29; *Paul v. Baugh*, 85 Va. 955, 9 S. E. 329; *Lucas v. Claffin*, 76 Va. 269; *Williams v. Lord*, 75 Va. 390; *McCullough v. Somerville*, 8 Leigh, 415; *Skipwirth v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642.

Wash.—*Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *Langert v. David*, 14 Wash. 389, 44 Pac. 875; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509; *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256.

W. Va.—*Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *Harden v. Wagner*, 22 W. Va. 356.

Wis.—*Kickbusch v. Corwith*, 108 Wis. 634, 85 N. W. 148; *Haring v. Hamilton*, 107 Wis. 112, 82 N. W. 698; *Erdall v. Atwood*, 79 Wis. 1, 47 N. W. 1124; *Stevens v. Breen*, 75 Wis. 595, 44 N. W. 645; *Greene, etc., Co. v. Remington*, 72 Wis. 648, 39 N. W. 767, 40 N. W. 643; *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304; *Landauer v. Vietor*, 69 Wis. 434, 34 N. W. 229; *Carter v. Rewey*, 62 Wis. 552, 22 N. W. 129; *Allen v. Kennedy*, 49 Wis. 549, 5 N. W. 906; *Gage v. Chesebro*, 49 Wis. 486, 5 N. W. 881.

Can.—*Daglish v. McCarthy*, 19 Grant Ch. (U. C.) 578; *Atty.-Gen. v. Harmer*, 16 Grant Ch. (U. C.)

533; *McMaster v. Clare*, 7 Grant Ch. (U. C.) 550; *Ashley v. Brown*, 17 Ont. App. 500; *Gurofski v. Harris*, 27 Ont. 201, 23 Ont. App. 717; *White v. Stevens*, 7 U. C. Q. B. 340.

Eng.—*Maskelyne v. Smith* (1902), 2 K. B. 158, 71 L. J. K. B. 476, 86 L. T. Rep. N. S. 832, 9 Manson, 139; *Alton v. Harrison*, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; *Middleton v. Pollock*, 2 Ch. Div. 104, 45 L. J. Ch. 293; *Wood v. Dixie*, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892; *Caillaud v. Extwick*, 2 Anstr. 381, 5 T. R. 420; *Goss v. Neale*, 5 Moore C. P. 19, 16 E. C. L. 87; *Pickstock v. Lyster*, 3 M. & S. 371, 16 Rev. Rep. 300; *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howell*, 4 East, 1.

2. *Reed v. McIntyre*, 98 U. S. 510; *Mayer v. Hellman*, 91 U. S. 500; *Brashear v. West*, 7 Pet. (U. S.) 608; *Campbell v. Colorado Coal, etc., Co.*, 9 Colo. 65, 10 Pac. 248.

3. *Tillou v. Britton*, 9 N. J. L. 120. See also *Dana v. Stanford*, 10 Cal. 269; *Dalton v. Stiles*, 74 Mich. 726, 42 N. W. 169; *Braden v. O'Neil*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; *Covan-hovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57, for reasons of the rule set forth in the text.

4. *Green v. McCrane*, 55 N. J. Eq. 436, 37 Atl. 318.

The inquiry should be whether the act done was a *bona fide* transaction or a mere trick or contrivance to defeat creditors.⁵ The statutes of 13 Elizabeth and other general statutes avoiding fraudulent conveyances in behalf of creditors and subsequent purchasers do not apply to any conveyance made *bona fide* for valuable consideration, and do not prevent a debtor in failing circumstances from preferring one class of creditors to another,⁶ and such a preference, although its effect will be to deprive other creditors of the means of satisfying their claims and defeat their entire claim, does not of itself "hinder, delay, or defraud creditors" within the meaning of those statutes,⁷ since other creditors alleged to have been defrauded thereby have no legal right to priority;⁸ and such preference is not fraudulent either in law or in fact.⁹ A creditor has a right to seek and obtain from his debtor a preference for or payment of his debt to the exclusion of all other creditors, without any imputation of fraud upon either party,¹⁰ and he may take payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.¹¹

5. *Stewart v. English*, 6 Ind. 176; *Attorney-General v. Harman*, 16 Grant Ch. (U. C.) 533.

6. *Skipwith's Ex'r v. Cunningham*, 8 Leigh (Va.), 271, 31 Am. Dec. 642.

7. See cases generally cited in first note to this section.

8. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

9. *Uhler v. Maulfair*, 23 Pa. St. 481.

10. *Mabbett v. White*, 12 N. Y. 442; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Appeal of Candee*, 193 Pa. St. 644, 43 Atl. 1093; *West Coast*

Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35.

The payment of a sum of money to procure a conveyance of property, by a debtor to a creditor by way of preference, does not render the transaction fraudulent as to the other creditors, since it does not withdraw anything from such creditors to which they could be entitled, but increases the remaining assets of the debtor. *Bangs Milling Co. v. Burns*, *supra*.

11. *Wheaton v. Neville*, 19 Cal. 41; *Dana v. Stanford*, 10 Cal. 269; *Williams v. Andrews*, 185 Ill. 98, 56 N. E. 1041, *aff'g* 84 Ill. App. 289; *Gray v. St. John*, 35 Ill. 222; *Storey v. Agnew*, 2 Ill. App. 353; *Ellis v. Valentine*, 65 Tex. 532.

The preference may be by a judgment, a mortgage, a deed, a transfer of securities or choses in action, the sale of personal property, or the payment of money or otherwise.¹² Where a debtor exercises the right of preference honestly, his acts, whether the preference be created by sale or pledge, are unimpeachable.¹³ Courts of equity as well as courts of law recognize the right of a debtor to give a preference to one creditor over another,¹⁴ although preferences by insolvent debtors are not favored in courts of equity.¹⁵ In the absence of any fraudulent intent, the motive which prompts the debtor to make the preference is not material. He may make it because he is under a legal, equitable, or moral obligation to do so, or he may do it from mere caprice or fancy and the law will uphold it, if made in good faith and in payment of an honest debt.¹⁶ An agreement or promise by a debtor

12. *Wilder v. Winnie*, 6 Cow. (N. Y.) 284; *Smith v. Craft*, 12 Fed. 856, 11 Biss. (U. S.) 340.

13. *Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391; *York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494.

14. *N. Y.*—*Jackson v. Cornell*, 1 Sandf. Ch. 438; *Williams v. Brown*, 4 Johns. Ch. 682; *Nicholl v. Mumford*, 4 Johns. Ch. 522; *McNenomy v. Roosevelt*, 3 Johns. Ch. 446; *Hendricks v. Walden*, 17 Johns. 438; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Murry v. Riggs*, 15 Johns. 571, *rev'g* 2 Johns. Ch. 565.

Ga.—*Lavender v. Thomas*, 18 Ga. 668.

Md.—*Crawford v. Austin*, 34 Md. 49.

Miss.—*Agricultural Bank v. Dorsey*, *Freem.* 338.

N. J.—*Green v. McCrane*, 55 N. J. Eq. 436, 37 Atl. 318.

Ohio.—*Hauel v. Mintzer*, 1 Handy, 375, 12 Ohio Dec. 191. See also other cases cited in first note to this

section.

15. *Williams v. Brown*, 4 Johns. Ch. (N. Y.) 682; *Woonsocket Rubber Co. v. Falley*, 30 Fed. 808.

16. *N. Y.*—*National Park Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524; *Grover v. Wakeman*, 11 Wend. 187, 25 Am. Dec. 624.

U. S.—*Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522, 11 Wheat. 78, 6 L. Ed. 423; *Smith v. Craft*, 12 Fed. 856, 11 Biss. 340, 17 Fed. 705, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267.

Ala.—*Bray v. Ely*, 105 Ala. 553, 17 So. 180; *Bates v. Van Diver*, 102 Ala. 249, 14 So. 631; *Kilgore v. Stoner* (1892), 12 So. 60, preference to debtor's wife; *First Nat. Bank v. Smith*, 93 Ala. 97, 2 So. 548.

Ill.—*Wickler v. People*, 68 Ill. App. 282.

Ky.—*Young v. Stallings*, 5 B. Mon. 307.

Md.—*Crawford v. Austin*, 34 Md. 49, preferences are no doubt always made from secret motives or induce-

for a future preference in case of insolvency, or to make a preferential assignment in favor of a particular creditor in case it becomes necessary to protect him, is not in law a fraud upon other creditors, nor is it conclusive evidence of fraud.¹⁷ That a conveyance in honest payment of a real debt is brought about by the action of other creditors in pressing their claims will not render it fraudulent,¹⁸ nor will the fact that the creditor preferred had not demanded payment.¹⁹ A conveyance to a creditor for a fair price in satisfaction of a just debt will not be set aside on the mere conjecture that the purchaser may afford to the debtor future assistance, or because the debtor knows or expects that the purchaser will make some provision for the debtor's family.²⁰ Since the law allows a debtor to prefer creditors, any conveyance by a debtor which has the effect of transferring property to one or more creditors at a fair valuation in payment of a debt or debts conceded to be just and honest is not fraudulent as against other creditors.²¹

ments operating upon the mind of the grantor, but equity does not inquire into them, if the debts are preferred in good faith, and all the property of the grantor, without reservation, is dedicated to the use and benefit of creditors.

N. D.—Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60.

Ohio.—Barr v. Hatch, 3 Ohio, 527, where the motive of the debtor was to prevent sacrifice of his property.

S. C.—Thorpe v. Thorpe, 12 S. C. 154; Cureton v. Doby, 10 Rich. Eq. 411, 73 Am. Dec. 96.

Tenn.—Jones v. Cullen, 100 Tenn. 1, 42 S. W. 873.

Tex.—Greenleve v. Blum, 59 Tex. 124.

Can.—Attorney-General v. Harmer, 16 Grant Ch. (U. C.) 533; McMaster v. Clare, 7 Grant Ch. (U. C.) 550.

Eng.—Wood v. Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892.

17. National Park Bank v. Whitmore, 104 N. Y. 297, 10 N. E. 524; Smith v. Craft, 17 Fed. 705. See also Haydock v. Coope, 53 N. Y. 68; Spaulding v. Strang, 37 N. Y. 135, 38 N. Y. 1; Walker v. Adair, 1 Bond (U. S.), 158; Anderson v. Lachs, 59 Mass. 111.

18. McAlister v. Honea, 71 Miss. 256, 14 So. 264.

19. McFadden v. Ross, 126 Ind. 341, 26 N. E. 76.

20. Young v. Stallings, 44 Ky. 307; Hesse v. Barrett, 41 Or. 202, 68 Pac. 751; McPherson v. McPherson, 21 S. C. 261; Cureton v. Doby, 10 Rich. Eq. (S. C.) 411, 73 Am. Dec. 96.

21. Hooker v. Sutcliff, 71 Miss. 792, 15 So. 140, the fact that a creditor secured by mortgage waives his

§ 2. **Statutory provisions.**—In several states the common law right of a debtor to prefer creditors is recognized and affirmed by the statutes.²² But provisions limiting and restricting the right to give preferences are contained in the federal bankruptcy act,²³ the insolvency laws of various states,²⁴ the statutes relating to assignments for the benefit of creditors,²⁵ and other statutes designed to enforce just and equitable distribution of a debtor's property to his creditors.²⁶ In cases not within these statutes

lien upon specific property in favor of a creditor whose claim is as meritorious as that of any other creditor will not render such mortgage fraudulent; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96, an agreement that a debtor shall execute a chattel mortgage upon his entire stock of goods, but reserving the right to withdraw a certain amount of such goods to be turned over to another creditor in payment of a just claim, is not fraudulent as against other creditors, nor is the chattel mortgage executed and delivered under such agreement; *Tenant, etc., Shoe Co. v. Partridge*, 82 Tex. 329, 18 S. W. 310, a creditor who holds a note due his insolvent debtor as security for his debt, and who surrenders it at the debtor's request to another *bona fide* creditor of the debtor, does not thereby commit a fraud on other creditors that will *per se* render void a subsequent turning over of property by the debtor to him in payment of his debts, if the note was not surrendered in contemplation of the property being turned over to him; *Martin-Brown Co. v. Siebe*, 6 Tex. Civ. App. 232, 26 S. W. 327, the fact that the insolvent debtor was induced by his counsel to prefer a creditor also represented by such counsel, instead of another first

named, in order that such other creditor should be forced to purchase the property, does not invalidate such preference.

22. *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323, Cal. Code Civ. Proc., § 3433; *Brittain v. Burnham*, 9 Okla. 522, 60 Pac. 241, St. 1893, § 2660; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96, Comp. Laws, § 4653; *Frees v. Barker*, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340, Tex. Rev. St. art. 2365.

23. Bankr. Act, 1898, § 60a.

24. See Statutes of the several states.

25. See Statutes.

26. In Ohio under a statute providing that transfers by a debtor with intent to hinder, delay, or defraud creditors shall be declared void at the suit of any creditor, the intent to prefer is made constructively fraudulent, rendering the transfer voidable, and it is not necessary, in order to set aside a transfer, that actual fraud or intent to defraud be shown. *Barber v. Coit*, 144 Fed. 381.

In Louisiana all preferences are prohibited except payments in money, under the provisions of the Civil Code. *Johnson v. Marx Levy & Bro.*, 109 La. 1036, 34 So. 68; *Petetin v. His Creditors*, 51 La. Ann. 1660, 26 So. 471; *Minge v. Barbre*, 51

preferences are valid as stated in the last section.²⁷ For example, a failing debtor may prefer any of his creditors, by a bill of sale, confession of judgment, or otherwise, to the extent of his entire property, where the statute limiting the amount of preference only applies to general assignments for the benefit of creditors and does not prohibit the debtor from exercising his general com-

La. Ann. 1285, 26 So. 180, the property of the debtor is the common pledge of his creditors, and any arrangement, whether through the machinery of the courts, or otherwise, whereby the debtor unites with one creditor to give such creditor an advantage over others, is in violation of the prohibitions of the law, and will not be permitted to stand; *Appleby v. Lehman*, 51 La. Ann. 473, 25 So. 132; *Xigues v. Rivas*, the payments of just debts in money are valid, although the debtor is insolvent and the fact is known to the creditor. *Compare Sentell v. Hewitt*, 49 La. Ann. 1021, 22 So. 242. A man may lawfully surrender to his creditors all property he has, and, unless the vendor of particular goods has preserved his privilege, the proceeds of the goods will be distributed among his creditors; and he may give his wife, whom the law prefers to all other creditors, such goods in satisfaction of her lawful claim against him for paraphernal property received and alienated by him, so that she may acquire a perfect title thereto, unless it is encumbered with a vendor's privilege. *Compton v. Dietlein & Jacobs* (1906), 42 So. 964.

In Nebraska a creditor may secure his own debt by taking adequate security, but cannot cover up

all of his debtor's property so that other creditors cannot reach it, where such property greatly exceeds the amount of his claim; but he must limit his security to a sufficient amount to satisfy his claims. *Brown v. Work*, 1 Neb. L. J. 437, 47 N. W. 192; *Russell v. Lau*, 1 Neb. L. J. 442, 47 N. W. 193; *Morse v. Steinerod*, 29 Neb. 108, 1 Neb. L. J. 300, 46 N. W. 922.

In North Carolina preferences were prohibited by the statute of 1895, which was held to apply only to conveyances made to secure pre-existing debts, and not debts created when the conveyance was executed. *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9. This statute was repealed in 1897. See also *McKay v. Gilliam*, 65 N. C. 130.

In Canada the statutes have been construed in a number of cases. *Stephens v. McArthur*, 19 Can. Sup. Ct. 446; *Molson Bank v. Halter*, 18 Can. Sup. Ct. 88; *Long v. Hancock*, 12 Can. Sup. Ct. 532; *Toronto Bank v. McDougall*, 15 U. C. C. P. 475; *Ferrie v. Cleghorn*, 19 U. C. Q. B. 241.

27. Habegger v. Kipp, 96 Minn. 456, 105 N. W. 489; *First State Bank v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485. See also cases cited in first note to last preceding section.

mon law right of preference.²⁸ But a statute declaring invalid any preference given by an insolvent, applies as well to a transfer of specific property for particular debts as to a general assignment for the benefit of creditors.²⁹ In some states preferences given in contemplation of insolvency are declared by statute to inure to the benefit of all the creditors and provision is made for enforcing the rights of creditors under the statute.³⁰ But these statutes have been held not to render conveyances fraudulent or void as against creditors on the ground that they are preferential, except in proceedings under the act and where they are not attacked conveyances making preferences are valid as at common law.³¹

§ 3. **Constitutionality of statutes.**—The right of a debtor, when solvent, to transfer property is within the constitutional protection of property rights, and is violated by a statute declaring that every transfer of property to prefer creditors, or which “would have that effect,” shall be void, without limiting it to cases of insolvency, and such a statute is, therefore, unconstitutional.³²

§ 4. **What law governs.**—The validity of a transfer of real estate made by a debtor to his creditors by way of preference is

28. *Gomez v. Hagaman*, 84 Hun (N. Y.), 148, 32 N. Y. Supp. 453; *Wharton v. Clements*, 3 Del. Ch. 209; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70; *Berry v. O'Connor*, 33 Minn. 29, 21 N. W. 840; *Eldridge v. Phillipson*, 58 Miss. 270; *Jaffray v. Mathews*, 120 Mo. 317, 25 S. W. 187; *Kavanaugh v. Oberfelder*, 37 Neb. 647, 56 N. W. 316.

29. *Wolf v. McGergin*, 37 W. Va. 552, 16 S. E. 797.

30. See statutes of the several states; *Ex parte Jordan*, 50 Mass. 292.

31. *Redd v. Redd*, 23 Ky. L. Rep. 2379, 67 S. W. 367; *Hoover v. Hawks*, 21 Ky. L. Rep. 190, 51 S. W. 606; *Atkins v. Hoeberlin*, 19 Ky. L. Rep. 1547, 43 S. W. 711; *Rosenberg v. Smith*, 19 Ky. L. Rep. 341, 40 S. W. 243; *Penniman v. Cole*, 49 Mass. 496; *Dyson v. St. Paul Nat. Bank*, 74 Minn. 439, 77 N. W. 236, 73 Am. St. Rep. 358; *Berry v. O'Conner*, 33 Minn. 29, 21 N. W. 840; *Bartles v. Dodd*, 56 W. Va. 383, 49 S. E. 414.

32. *Third Nat. Bank v. Divine Grocery Co.*, 97 Tenn. 603, 37 S. W. 390, 34 L. R. A. 445; *Stratton v. Morris*, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

governed and determined by the law of the state or jurisdiction where the property conveyed is situated and not by that of the jurisdiction where the contract was made or the transfer executed.³³ But the legality of a transfer of personal property by a debtor to his creditor as a preference is to be determined by the law of the place where the contract was made, and not by the law of the place where the goods were received by the creditor, when nothing remains for the creditor to do but receive the goods on their arrival and apply them on his claim.³⁴ The transfer of property by a debtor cannot be set aside as fraudulent because it was contrary to the United States bankrupt act, and void, under that act, by reason of a preference thereby given to one creditor over others, where such preference was valid under the law of the state at the time.³⁵ A preference given by an insolvent non-resident debtor to a *bona fide* creditor cannot be avoided by an attaching creditor, as such debtor is not controlled by the insolvent laws.³⁶

§ 5. **Nature and form of preference in general.**—In the absence of a bankrupt law, a debtor is not deprived of the absolute control of his unincumbered property by mere insolvency. His debts are only personal obligations and so long as he acts in good faith and in a manner not prohibited by law he may deal with it as he sees fit.³⁷ As an insolvent debtor may prefer one creditor to another, or to the exclusion of all others, his purpose to do so is lawful, and the means employed by him to carry it into effect, or the particular form of the transaction by which it is accomplished, are not material so far as the rights of other creditors are concerned, unless they are such as are expressly prohibited by

33. *Brown v. Early*, 63 Ky. 369; *Chipman v. Peabody*, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437; *Brannon v. Brannon*, 2 Disn. (Ohio), 224.

34. *Koster v. Merritt*, 32 Conn. 246; *Kahn v. Fischbein*, 55 Minn. 509, 57 N. W. 154.

35. *Smith v. Deidrick*, 30 Minn. 60, 14 N. W. 262; *Park v. Bamberger*, 52 Miss. 565.

36. *Sawyer v. Levy*, 162 Mass. 190, 38 N. E. 365.

37. *Delaney v. Valentine*, 154 N. Y. 692, 704, 49 N. E. 65.

statute.³⁸ Under the rules and principles stated in the preceding sections of this chapter, a valid preference by an insolvent debtor may be made to one or more creditors by the conveyance by deed or other instrument of transfer of real or personal property, either directly to the creditor in payment and satisfaction of his debt or claim,³⁹ or to a third person for the benefit of such creditor or creditors,⁴⁰ or to a trustee for the benefit of the creditors

38. *N. Y.*—*Delaney v. Valentine*, *supra*; *Wilder v. Winne*, 6 Cow. 284.

U. S.—*Rice v. Adler-Goldman Commission Co.*, 71 Fed. 151, 18 C. C. A. 15.

Cal.—*Priest v. Brown*, 100 Cal. 626, 35 Pac. 323.

Ill.—*Chicago, etc., R. Co. v. Watson*, 113 Ill. 195.

Md.—*Anderson v. Tydings*, 3 Md. Ch. 167, 8 Md. 427, 63 Am. Dec. 708.

N. J.—*Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 13.

Pa.—*York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494; *Uhler v. Maulpair*, 23 Pa. St. 481; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57.

Wash.—*Troy v. Morse*, 22 Wash. 280, 60 Pac. 648; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

39. *N. Y.*—*Obermeyer v. Jung*, 51 App. Div. 247, 64 N. Y. Supp. 959; *Drury v. Wilson*, 4 App. Div. 232, 38 N. Y. Supp. 538.

U. S.—*Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; *Smith v. Craft*, 12 Fed. 856, 11 Biss. 340, appeal *dismissed*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267.

Ala.—*Cook v. Thornton*, 109 Ala. 523, 20 So. 14; *Bray v. Ely*, 105 Ala. 553, 17 So. 180; *Goetter v. Smith*, 104 Ala. 481, 16 So. 534; *Schloss v. McGuire*, 102 Ala. 626, 15 So. 275;

Bates v. Vandiver, 102 Ala. 249, 14 So. 631; *Fargason v. Hall*, 99 Ala. 209, 13 So. 302; *Pollock v. Meyer*, 96 Ala. 172, 11 So. 385; *Ellison v. Moses*, 95 Ala. 221, 11 So. 347.

Ill.—*Oakford v. Dunlap*, 63 Ill. App. 498.

Ind.—*Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 893.

Kan.—*Schram v. Taylor*, 51 Kan. 547, 33 Pac. 315.

Ky.—*Young v. Stallings*, 44 Ky. 307.

Md. — *Commonwealth Bank v. Kearns*, 100 Md. 202, 59 Atl. 1010; *Thompson v. Williams*, 100 Md. 195, 60 Atl. 26.

Mo.—*Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212.

Pa.—*Snayberger v. Fahl*, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. Dec. 818; *Clemens v. Davis*, 7 Pa. St. 263.

Tex.—*Greenleve v. Blum*, 59 Tex. 124.

Vt.—*Lyon v. Rood*, 12 Vt. 233.

That a debtor sold his stock of goods without inventory and without inspection by the vendee, in payment of a pre-existing debt, does not render the sale fraudulent as to other creditors. *Cocke v. Carrington Shoe Co.* (Miss. 1895), 18 So. 683.

40. *Delaney v. Valentine*, 154 N. Y. 692, 49 N. E. 65, *rev'd* 11 App. Div. (N. Y.) 631, 41 N. Y. Supp. 1123, and *distinguishing* *Sutherland v.*

to be preferred, unless the deed of trust falls within the prohibition of the assignment laws or is tainted with fraud;⁴¹ by mortgage of the real estate or personal property of the debtor or both;⁴²

Bradner, 116 N. Y. 410, 22 N. E. 554; Collomb v. Caldwell, 16 N. Y. 486; Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill (N. Y.), 438, a transfer by a debtor whose property is insufficient to pay his debts in full, of a portion of his property to a third person to secure a part of his creditors, is not within the Statute of Personal Uses, when it contains no provision for returning any surplus, and if made in good faith, for the purpose of giving lawful preferences in the payment of honest debts, and so not fraudulent in fact, it is not fraudulent in law, but is valid as against other creditors; Morse v. Slason, 13 Vt. 296, an insolvent debtor may prefer some one of his creditors by a deed of land, duly executed and delivered to a third person in trust, to be delivered to the grantee at the decease of the grantor, unless he shall otherwise direct during his lifetime.

41. U. S.—Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341, *overruling* Martin v. Hausman, 14 Fed. 160, and cases following it; Bean v. Patterson, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126; Ontario Bank v. Hurst, 103 Fed. 231, 43 C. C. A. 193.

Ala.—Stetson v. Miller, 36 Ala. 642; Miller v. Stetson, 32 Ala. 161; Evans v. Lamar, 21 Ala. 333.

Ark.—Dews v. Cornish, 20 Ark. 332.

Cal.—Heath v. Wilson, 139 Cal. 362, 73 Pac. 182.

Mass.—New England Mar. Ins. Co. v. Chandler, 16 Mass. 275; Stevens v. Bell, 6 Mass. 339; Henshaw v. Sumner, 23 Pick. 446.

Mich.—Geer v. Traders' Bank, 132 Mich. 215, 93 N. W. 437.

Miss.—Baldwin v. Flash, 58 Miss. 593.

Mo.—Wood v. Porter, 179 Mo. 56, 77 S. W. 762, deed of trust of debtor's equity of redemption; Crothers v. Busch, 153 Mo. 606, 55 S. W. 149; Jaffrey v. Mathews, 120 Mo. 317, 25 S. W. 187; Crow v. Beardsley, 68 Mo. 435; Bell v. Thompson, 3 Mo. 84.

N. J.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13.

Tenn.—Fidelity, etc., Co. v. O'Brien (Ch. App. 1896), 38 S. W. 417.

Tex.—Johnson v. Robinson, 68 Tex. 399, 4 S. W. 625; Iglehart v. Willis, 58 Tex. 306; Martin-Brown Co. v. Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Pessels v. Schwab Clothing Co. (Civ. App. 1894), 25 S. W. 814; Butler v. Sanger, 4 Tex. Civ. App. 411, 23 S. W. 487.

Eng.—Alton v. Harrison, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034.

Under the Georgia statute a conveyance by an insolvent debtor in trust for a part of his creditors was void as to the creditors excluded. Norton v. Cobb, 20 Ga. 44; Brown v. Lee, 7 Ga. 267; Ezekiel v. Dixon, 3 Ga. 146.

42. N. Y.—Delaney v. Valentine, 154 N. Y. 692, 49 N. E. 65; Carpenter v. Muren, 42 Barb. 300. See also New York County Nat. Bank v. American Surety Co., 69 App. Div. 153, 74 N. Y. Supp. 692, *aff'd* 174 N. Y. 544, 67 N. E. 1086; Manchester v. Tibbetts, 4 N. Y. Supp. 23.

unless the mortgage by its terms attempts to prevent access by the

U. S.—Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 791; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

Ala.—McWilliams v. Rodgers, 56 Ala. 87.

Ark.—Marquese v. Felsenthal, 58 Ark. 293, 24 S. W. 493; Huff v. Roane, 22 Ark. 184; Cox v. Fraley, 26 Ark. 20.

Cal.—Wood v. Franks, 67 Cal. 32, 7 Pac. 50.

Ga.—Hollingsworth, v. Johns, 92 Ga. 428, 17 S. E. 621; Solomon v. Sparks, 27 Ga. 385; Lavender v. Thomas, 18 Ga. 668; Davis v. Anderson, 1 Ga. 176.

Ill.—Union Nat. Bank v. State Nat. Bank, 168 Ill. 256, 48 N. E. 169, *aff'g* 68 Ill. App. 431; Weber v. Mick, 131 Ill. 520, 23 N. E. 646; Kahn v. Kohn, 35 Ill. App. 437.

Ind.—Ayers v. Adams, 82 Ind. 109.

Iowa.—Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835; Southern White Lead Co. v. Haas, 73 Iowa, 390, 33 N. W. 657, 35 N. W. 494; Farwell v. Howard, 26 Iowa, 381; Fromme v. Jones, 13 Iowa, 474.

Kan.—Matthewson v. Caldwell, 59 Kan. 126, 52 Pac. 104; Connor v. Hardwick, 53 Kan. 60, 35 Pac. 777; First Nat. Bank v. Naill, 52 Kan. 211, 34 Pac. 797; Standard Implement Co. v. Parlin, etc., Co., 51 Kan. 632, 33 Pac. 362; First Nat. Bank v. Ride-nour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167; Randall v. Shaw, 28 Kan. 419.

Ky.—Brewer v. Cosby, 71 Ky. 388; Kennaird v. Adams, 50 Ky. 102; Robinson v. Collier, 50 Ky. 332, 52 Am. Dec. 572.

Mass.—Henshaw v. Sumner, 40 Mass. 446; Harrison v. Phillips Academy, 12 Mass. 456.

Mich.—Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721; Whitfield v. Stiles, 57 Mich. 410, 24 N. W. 119; Adams v. Niemann, 46 Mich. 135, 8 N. W. 719.

Miss.—Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653.

Mo.—Schroeder v. Bobbitt, 108 Mo. 289, 18 S. W. 1093; Colbern v. Robinson, 80 Mo. 541; Donk Bros. Coal, etc., Co. v. Stevens, 74 Mo. App. 39.

Neb.—Grand Island Banking Co. v. Costello, 45 Neb. 119, 63 N. W. 376; Kilpatrick-Koch Dry Goods Co. v. McPheely, 37 Neb. 800, 56 N. W. 389; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Davis v. Scott, 27 Neb. 642, 43 N. W. 407; Grimes v. Farrington, 19 Neb. 44, 26 N. W. 618.

N. J.—Green v. McCrane, 55 N. J. Eq. 436, 37 Atl. 318; Metropolis Nat. Bank v. Sprague, 20 N. J. Eq. 13; Jones v. Naughtright, 10 N. J. Eq. 298.

N. D.—Cutter v. Pollack, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377.

Ohio.—Kemp v. Walker, 16 Ohio, 118.

Okla.—Jaffray v. Wolf, 1 Okla. 312, 35 Pac. 945.

Pa.—Lindle v. Neville, 13 Serg. & R. 227.

S. C.—Bomar v. Means, 53 S. C. 232, 31 S. E. 234; McGee v. Wells, 52 S. C. 472, 30 S. E. 602; Central, etc., R. Co. v. Claghorn, Speers Eq. 545.

S. D.—Jones v. Meyer, 7 S. D. 152, 63 N. W. 773.

Tenn.—Phillips v. Cunningham

unsecured creditors to the equity of redemption;⁴³ by a confession of judgment;⁴⁴ by allowing a judgment to be taken by default;⁴⁵

(Ch. App. 1899), 58 S. W. 463; *McGrew v. Hancock* (Ch. App. 1899), 52 S. W. 500.

Tex.—*Compton v. Marshall*, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; *Martin-Brown Co. v. Siebe*, 6 Tex. Civ. App. 232, 26 S. W. 327.

Vt.—*McGregor v. Chase*, 37 Vt. 225.

Wash.—*Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256.

Wis.—*Kickbusch v. Corwith*, 108 Wis. 634, 85 N. W. 148; *Stevens v. Breen*, 75 Wis. 595, 44 N. W. 645; *Chicago Coffin Co. v. Maxwell*, 70 Wis. 282, 35 N. W. 733. See *Berry v. O'Connor*, 33 Minn. 29, 21 N. W. 840, as to effect of insolvent law.

43. *Chafee v. Blatchford*, 6 Mackey (D. C.), 459.

44. *N. Y.*—*Galle v. Todd*, 148 N. Y. 270, 42 N. E. 673; *aff'g* 74 Hun, 542, 26 N. Y. Supp. 633; *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430, 32 N. E. 239, *aff'g* 61 Hun, 557, 16 N. Y. Supp. 337; *Robinson v. Hawley*, 45 App. Div. 287, 61 N. Y. Supp. 138; *Rothchild v. Mannesovitch*, 29 App. Div. 580, 51 N. Y. Supp. 253; *London v. Martin*, 79 Hun, 229, 29 N. Y. Supp. 396, *aff'd* 149 N. Y. 586, 44 N. E. 1125; *Childs v. Latham*, 60 Hun, 578, 14 N. Y. Supp. 507; *Stein v. Levy*, 55 Hun, 381, 8 N. Y. Supp. 505; *Beards v. Wheeler*, 11 Hun, 539; *Williams v. Brown*, 4 Johns. Ch. 682.

U. S.—*Rice v. Adler-Goldman Commission Co.*, 71 Fed. 151, 18 C. C. A. 15.

Ala.—*Warren v. Hunt*, 114 Ala. 506, 21 So. 939. Compare *First Nat. Bank v. Acme White Lead, etc., Co.*, 123 Ala. 344, 26 So. 354.

Cal.—*Meeker v. Harris*, 19 Cal. 278, 79 Am. Dec. 215.

Del.—*Slessinger v. Topkis*, 1 Marv. 140, 40 Atl. 717.

Ill.—*Havens, etc., Co. v. First Nat. Bank*, 162 Ill. 35, 44 N. E. 384; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Chicago Stamping Co. v. Hanchett*, 25 Ill. App. 198.

Md.—*Citizens' F., etc., Ins. Co. v. Wallis*, 23 Md. 173.

Miss.—*Holberg v. Jaffray*, 64 Miss. 746, 2 So. 168.

Mo.—*Hard v. Foster*, 98 Mo. 297, 11 S. W. 760.

N. J.—*Goodwin v. Hamill*, 26 N. J. Eq. 24.

Ohio.—*Hauel v. Mintzer*, 1 Handy, 375, 12 Ohio Dec. 191.

Pa.—*Appeal of Candee*, 191 Pa. St. 644, 43 Atl. 1093; *Braden v. O'Neil*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156, 1 Atl. 731; *Walker v. Marine Nat. Bank*, 98 Pa. St. 574; *Keen v. Kleckner*, 42 Pa. St. 529; *Guy v. McIlree*, 26 Pa. St. 92; *Worman v. Wolfersberger*, 19 Pa. St. 59; *Davis v. Charles*, 8 Pa. St. 82; *Appeal of Blakley*, 7 Pa. St. 449; *Greenwalt v. Austin*, 1 Grant, 169; *Haldeman v. Michael*, 6 Watts & S. 128, 40 Am. Dec. 546; *Heiney v. Anderson*, 9 Lanc. Bar, 12; *Wetmore v. Wisner*, 2 Luz. Leg. Obs. 204.

S. C.—*Sloan v. Hunter*, 56 S. C. 385, 34 S. E. 658, 76 Am. St. Rep. 551; *Weinges v. Cash*, 15 S. C. 44; *Bevins v. Dunham*, 1 Speers, 39; *Cureton v. Doby*, 10 Rich. Eq. 411, 73 Am. Dec. 96; *Bird v. Aitken*, *Rice Eq.* 73; *Hill v. Rogers*, *Rice Eq.* 7.

by consenting to an order in a creditors' suit requiring the debtor to transfer property to the receiver;⁴⁶ or by having a policy of life insurance on his life made payable to one or more creditors.⁴⁷ A conveyance absolute in terms but intended by the parties to operate as a mortgage is not, as a rule, necessarily fraudulent as to the grantor's creditors, but may be given effect as a mortgage.⁴⁸ The fraudulent intent of the debtor cannot be imputed to the creditor who consents to confession of judgment in his favor, nor does such consent create the relation of principal and agent between the parties.⁴⁹ Fraud cannot be inferred from the fact that a single judgment by confession includes the separate claims of several creditors, the object being to place them on a footing of equality. Indeed the practice is rather to be commended, inasmuch as it gives the judgment creditors equal rights and prevents a race of diligence which might occur if separate judgments were given.⁵⁰ Where a partner desiring to prefer a creditor of the firm, the other partner being unwilling to do so, assists the creditor in suing out an attachment against the firm, his act

Va.—Johnson v. Lucas, 103 Va. 36, 48 S. E. 497.

Eng.—Meux v. Howell, 4 East, 1; Holdbird v. Anderson, 5 T. R. 235.

45. Rothchild v. Mannesovitch, 29 App. Div. (N. Y.) 580, 51 N. Y. Supp. 253, a judgment by default which gives preference to a certain creditor, though irregularly rendered, is not to be deemed on that account alone a fraudulent one; Appeal of Morgan, 20 Pa. St. 152; Worman v. Wolfersberger, 19 Pa. St. 59.

Contra.—Wright v. Fergus Falls Nat. Bank, 48 Minn. 120, 50 N. W. 1030.

Where a debtor submits to a default, and judgment is taken by the creditor for the whole claim in suit, though such claim has been partly satisfied, the judgment is void *in toto* against attaching creditors of the

debtor. Pierce v. Partridge, 44 Mass. 44.

46. Young v. Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

47. Duncel v. Failing, 52 Hun (N. Y.), 615, 5 N. Y. Supp. 504.

48. Doswell v. Adler, 28 Ark. 82; Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835; Harrison v. Phillips Academy, 12 Mass. 456. Compare Fuller v. Griffith, 91 Iowa, 632, 60 N. W. 247; Ellis v. Musselman, 61 Neb. 262, 85 N. W. 75. See also Absolute conveyance as security, chap. VI, § 15, *supra*; Secret reservations of trusts, chap. X, § 14, *supra*.

49. Hard v. Foster, 98 Mo. 297, 11 S. W. 760. See Preference not invalidated by mere fraudulent intent § 23, *infra*.

50. Harris v. Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

does not necessarily render the suit a collusive one as against other firm creditors.⁵¹ A valid preference may be effected by the debtor's organizing a corporation, transferring his property to the company, and having stock issued to pay or secure certain of his creditors.⁵²

§ 6. **Sale to pay debts to preferred creditors.**—An insolvent or failing debtor, who has the right to prefer certain creditors, is not required, in the exercise of that right, to convey his property directly to such creditors, but he may sell and transfer his property at a fair valuation to a responsible third person, and pay the proceeds to certain creditors to the exclusion of others,⁵³ although the purchaser knows of the insolvency of the debtor and

51. *Hyman v. Stadler*, 63 Miss. 362. See also *Collusive attachment*, chap. II, § 15, *supra*.

52. *Fisher v. Campbell*, 101 Fed. 156, 41 C. C. A. 256; *Scripps v. Crawford*, 123 Mich. 173, 81 N. W. 1098; *Troy v. Morse*, 22 Wash. 280, 60 Pac. 648. Compare *Colorado Trading, etc., Co. v. Acres Commission Co.*, 18 Colo. App. 253, 70 Pac. 954. See also *Organization of corporation*, chap. II, § 16, *supra*.

53. *N. Y.*—*Ruhl v. Phillips*, 48 N. Y. 125, 8 Am. Rep. 522; *Bedell v. Chase*, 34 N. Y. 386.

U. S.—*Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786.

Ala.—*Fargason v. Hall*, 99 Ala. 209, 13 So. 302.

Cal.—*Priest v. Brown*, 100 Cal. 626, 35 Pac. 323. Compare *Mamlock v. White*, 20 Cal. 598.

Ill.—*Holbrook v. First Nat. Bank*, 10 Ill. App. 140.

Ind.—*Wilcoxon v. Annesley*, 23 Ind. 285, where a creditor bought the debtor's goods and paid his own debt and debts of other preferred credi-

tors; *Anderson v. Smith*, 5 Blackf. 395.

Kan.—*Bishop v. Jones*, 28 Kan. 680.

Pa.—*York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494.

Tex.—*Ellis v. Valentine*, 65 Tex. 532.

Vt.—*Gregory v. Harrington*, 33 Vt. 241.

But under statutes prohibiting preferences by a debtor when insolvent or contemplating insolvency, a sale to pay preferred creditors is unlawful. *King v. Moody*, 79 Ky. 63; and the preferred creditor must bring in the money so received to be distributed ratably in payment *pro tanto* of the debts due to him and the creditors at whose instance the transaction is set aside. *Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 581, 44 S. E. 204; *Wolf v. McGugin*, 37 W. Va. 552, 16 S. E. 797. The remedy of a creditor who suffers by such preferential act is to institute a suit to have it treated as an assignment for the benefit of all the creditors. *Hoover v. Hawks*, 21 Ky. L. Rep. 190, 51 S. W. 606.

of his intent to make a preference,⁵⁴ and although the sale is made on credit, the vendor taking the purchaser's notes,⁵⁵ unless the purchaser knows of the vendor's fraudulent intent to hinder, delay and defraud his creditors.⁵⁶ An insolvent or failing debtor may sell his property to a third person in consideration that the purchaser pay certain debts owing by the debtor to certain specified creditors in the absence of any fraudulent intent.⁵⁷ Thus, deeds executed by one who was largely indebted as endorser of notes of a corporation in which he was a stockholder, conveying property to his children, for a consideration which was not inadequate, and which was fully paid by taking up such of the obligations upon which the father was endorser as he directed, are

54. *N. Y.*—Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522.

U. S.—Clements v. Moore, 6 Wall. 299, 18 L. Ed. 786.

Cal.—Priest v. Brown, 100 Cal. 626, 35 Pac. 323.

Pa.—York County Bank v. Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

Tex.—Ellis v. Valentine, 65 Tex. 532.

Vt.—Gregory v. Harrington, 33 Vt. 241.

55. Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522; Bedell v. Chase, 34 N. Y. 386; Clements v. Moore, 6 Wall. (U. S.) 299, 18 L. Ed. 786; Priest v. Brown, 100 Cal. 626, 35 Pac. 323; Gregory v. Harrington, 33 Vt. 241.

56. Ruhl v. Phillips, 48 N. Y. 125, 8 Am. Rep. 522.

57. *U. S.*—Blackmore v. Parkes, 81 Fed. 899, 26 C. C. A. 670.

Ind.—Wilcoxon v. Annesley, 23 Ind. 285; Anderson v. Smith, 5 Blackf. 395.

Ky.—Rosenberg v. Smith, 19 Ky. L. Rep. 341, 40 S. W. 243, such a sale is valid unless attacked under the statute.

Or.—Hesse v. Barrett, 41 Or. 202, 68 Pac. 751.

Pa.—Uhler v. Maulfair, 23 Pa. St. 481.

Tex.—Ellis v. Valentine, 65 Tex. 532.

Wis.—Greene, etc., Co. v. Remington, 72 Wis. 648, 39 S. W. 767, 40 N. W. 643; Ingram v. Osborn, 70 Wis. 184, 35 N. W. 304.

Assumption of debts by grantee.—When an insolvent mercantile firm sells its stock of merchandise to a disinterested party, such purchaser may, as a part of the purchase money, make a note payable directly to a bank that holds the note of said firm for a *bona fide* pre-existing debt, and substitute such note for the note of said firm held by the bank, under Code, chap. 74, § 2, as amended by Acts 1895, chap. 4, making preferential transfers by an insolvent fraudulent as to creditors, but providing that nothing in said section shall affect any transfer of any "evidence of debt in payment of or as collateral security for the payment of a *bona fide* debt," whether made at the time such debt

not fraudulent as to other creditors of the grantor, where preferences were permitted by the laws of the state.⁵⁸

§ 7. **Failure to apply proceeds to debts.**—A purchaser of property from an insolvent debtor, who believed at the time that the purchase money notes were to be used in a valid preference of certain creditors, is not bound to see that they are in fact so applied and is not guilty of any fraud because they are not applied in payment of such creditors, or are subsequently used for a fraudulent or invalid purpose, and the sale cannot be impeached by reason of such facts.⁵⁹ But if the property is bought by the purchaser partly with a view of aiding the debtor in preferring certain creditors, preferences of creditors being allowed by the *lex loci*, the purchaser is in equity responsible to the unpreferred creditors for so much of the purchase price as was applied by the debtor to his own use and not to the payment of creditors.⁶⁰

§ 8. **Splitting demand to expedite recovery.**—The parties to a large demand may, by agreement, divide it, and several confessions of judgment by the debtor, before a justice, for the parts, are lawful.⁶¹ It is lawful for a debtor, owing a large debt, to divide it into smaller sums, in order to enable his creditor to sue immediately before a magistrate and in that manner obtain judgments more speedily than his other creditors could, and thus give such creditor a preference. A transaction by a debtor is not fraudulent for merely baffling one creditor in order to pay another.⁶²

is contracted or in payment of a pre-existing debt. *Merchant & Co. v. Whitescarver*, 47 W. Va. 361, 34 S. E. 813. See also *Armstrong v. Oil Well Supply Co.*, 47 W. Va. 455, 35 S. E. 967.

58. *Corwine v. Thompson Nat. Bank*, 105 Fed. 196, 44 C. C. A. 442.

59. *Priest v. Brown*, 100 Cal. 626, 35 Pac. 323. See also *Gist v. Barrow*, 42 Ark. 521. See Duty to see

to application of proceeds, chap. XIII, § 16, *infra*.

60. *Clements v. Moore*, 6 Wall. (U. S.) 299, 18 L. Ed. 786.

61. *Cornell v. Cook*, 7 Cow. (N. Y.) 310.

62. *Andrews v. Kaufmans*, 60 Ga. 669; *Alexander v. Young*, 23 Ga. 616; *Bank of Savannah v. Planters' Bank*, 22 Ga. 466; *Lavender v. Thomas*, 18 Ga. 668; *Newdigate v.*

§ 9. **Delegation of power to prefer.**—The delegation of the debtor's power of preference in an instrument conveying property for the benefit of creditors renders the instrument void as to his creditors, since the right to give preference to creditors is a personal privilege of the debtor which cannot be delegated by him to another to be exercised at the latter's discretion.⁶³ If preferences are to be given, the relative interest of the creditors in the assigned property must be fixed by the assignment itself. A clause giving assignees power to give preferences in their discretion avoids the assignment for it might be used to coerce creditors into compromising.⁶⁴

§ 10. **Nature of property transferred.**—The nature of the property transferred by a debtor to a creditor by way of preference to pay or secure the debt is immaterial.⁶⁵ A debtor may pay a creditor his just debt in land at a fair valuation,⁶⁶ by the assignment of a judgment,⁶⁷ or a contract,⁶⁸ by the assignment of wages

Jacobs, 9 Dana (Ky.) 17. But see *Beach v. Atkinson*, 87 Ga. 288, 13 S. E. 591, collusion between a non-resident debtor and a creditor by which the former enables the latter to obtain judgments in advance of the time in which another creditor who has previously commenced proceedings can obtain judgment, for the purpose of defeating the latter's rights, will invalidate the judgments so obtained.

63. *Harvey v. Mix*, 24 Conn. 406; *Wagoner v. Cooley*, 17 Ill. 239; *Seger v. Thomas*, 107 Mo. 635, 18 S. W. 33; *Hargardine-McKittrick Dry Goods Co. v. Carnahan*, 79 Mo. App. 219. Compare *Dubose v. Dubose*, 7 Ala. 235, 42 Am. Dec. 588, a discretion given to a trustee, for whose indemnity the trust is created, to pay first either of two debts, for which he is liable as surety, warrants no inference of fraudulent intention.

64. *Strong v. Skinner*, 4 Barb. (N. Y.) 546; *Boardman v. Halliday*, 10 Paige (N. Y.), 223; *Barnum v. Hempstead*, 7 Paige (N. Y.), 568.

65. See cases cited in first note to first section of this chapter.

66. *Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 893; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57.

67. *Langert v. David*, 14 Wash. 389, 44 Pac. 875, an attorney although knowing of a judgment against his client, may secure himself for service rendered and money advanced by taking an assignment of a judgment against a third person, which he procures in the client's favor, and it is immaterial that to do so he is obliged to purchase the entire judgment, crediting thereon the amount of his claim.

68. *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304.

or salary,⁶⁹ or by the transfer of a promissory note,⁷⁰ or other personal property. A failing debtor may use property bought on credit of one to pay another.⁷¹ The doctrine that the capital of a corporation is a trust fund for the payment of its debts cannot be so extended as to subject such capital appropriated in payment of a claim for the construction of a plant for the company to a trust in favor of the contractors on account of supplies furnished the latter for the plant. And a creditor of the contractor to construct the plant of the corporation, on account of supplies furnished for the plant, is not entitled to subrogation under an agreement to which it is not a party, by which the contractor while he is insolvent in effect turns over the bonds and capital stock of the corporation, which had been turned over to him under his contract, to persons who advanced the money which enabled him to perform his contract.⁷²

§ 11. Nature of debts preferred in general.—The debt preferred must be a valid and subsisting demand of the creditor against the debtor capable of being enforced by action; otherwise the preference is a mere gift which may be set aside by other creditors.⁷³ Where an insolvent debtor executes a chattel mortgage to secure an antecedent debt of his wife the conveyance is fraudulent.⁷⁴ Any transfer of the assets of a corporation not made in the usual course of business and for value will be set aside in equity at the suit of creditors.⁷⁵ But any legal indebtedness of the debtor or any legal liability incurred by a third person on his behalf may become the subject of a preference.⁷⁶ A

69. *Hax v. Acme Cement Plaster Co.*, 82 Mo. App. 447.

70. *Marsh v. Davis*, 24 Vt. 363.

71. *O'Donald v. Constant*, 82 Ind. 212; *Baldwin v. Flash*, 58 Miss. 593. Compare *Krippendorf v. Hyde*, 28 Fed. 788.

72. *McNeal Pipe & F. Co. v. Bullock*, 174 Pa. 93, 34 Atl. 594.

73. See Pre-existing liability as

consideration—cases cited in note 97, chap. VIII, § 18.

74. *Lippitt v. Gilmartin*, 37 App. Div. (N. Y.) 411, 55 N. Y. Supp. 1042.

75. *Banton v. Smith*, 113 Ill. 481.

76. See cases cited in the following notes: *Sloan v. Hunter*, 56 S. C. 385, 34 S. E. 658, 76 Am. St. Rep.

sale by a debtor to his creditor in payment of an account is not invalid because a portion of the account was for charges for tobacco and liquors, although the debtor may have used them lavishly.⁷⁷

§ 12. **Debts not due.**—An insolvent debtor may prefer a creditor by paying or securing his debt, though the debt is not due.⁷⁸ The law does not forbid a debtor to pay and a creditor to receive a debt before it is due, provided the creditor's purpose is to receive his own debt and not to defeat or delay another.⁷⁹ Where there are two debts owing to the same creditor, one already due and payable and the other payable at a distant date, the creditor may take from his debtor security for the payment of both without inference or imputation of fraud, although the debtor is in failing circumstances.⁸⁰ An attorney may always demand and receive a reasonable compensation before rendering services, and the payment will be valid, even in the case of one contemplating bankruptcy.⁸¹

551, a debt contracted for the purchase of slaves was not invalidated by the abolition of slavery.

77. *Iley v. Niswanger*, 1 McCord Eq. (S. C.) 518.

78. *U. S.*—*Smith v. Craft*, 12 Fed. 856, 11 Biss. 340, appeal *dismissed*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267.

Ga.—*Alexander v. Young*, 23 Ga. 616.

Ill.—*Cipher v. McFall*, 69 Ill. App. 228.

Mo.—*State v. Excelsior Distilling Co.*, 20 Mo. App. 21.

Ohio.—*Hauel v. Mintzer*, 1 Handy, 375, 12 Ohio Dec. (Reprint) 191, an accommodation endorser who has assumed the payment of the notes not yet due, and thereby made himself absolutely liable for their

payment, may in good faith take a mortgage or other security from the debtor to indemnify him from ultimate loss.

Pa.—*Commonwealth v. Smith*, 1 Brewst. 347.

Tenn.—*McGrew v. Hancock* (Ch. App. 1899), 52 S. W. 500.

Tex.—*Frees v. Baker*, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340; *Mayer v. Templeton* (Civ. App. 1899), 53 S. W. 68, *rent*; *Butler v. Sanger*, 4 Tex. Civ. App. 411, 23 S. W. 487.

79. *McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86.

80. *Carpenter v. Muren*, 42 Barb. (N. Y.) 300.

81. *Lyon v. Marshall*, 11 Barb. (N. Y.) 241; *Reed v. Mellor*, 5 Mo. App. 567.

§ 13. **Contingent debts and liabilities on behalf of debtor.**—

A contingent liability on behalf of a debtor, as well as an existing indebtedness, is a good and valid consideration for a preferential transfer of property by a debtor to a creditor.⁸² A confession of judgment by a debtor to secure a contingent liability is not a fraud in law, and whether it is fraud in fact depends upon the attendant circumstances.⁸³ The endorser of commercial paper has full power, with the consent of the person discounting the paper, to use it as a debt due him, and to protect his endorsement by obtaining a conveyance from the debtor to the amount of such paper.⁸⁴ A bill of sale, executed to secure the vendee from his liability as endorser of a promissory note made for the accommodation of the vendor, is not fraudulent and void as against creditors under the statute of frauds.⁸⁵ A debtor may secure a surety who is liable for him, in preference to paying other creditors, if he does so in good faith and without any design to conceal his property from his creditors.⁸⁶ The liability of an acceptor of a

82. *Curtis v. Fox*, 191 Pa. St. 644, 43 Atl. 1093.

83. *Braden v. O'Neil*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761.

84. *Bamberger v. Schoolfield*, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374. See also cases cited in last two preceding notes.

85. *Weller v. Wayland*, 17 Johns. (N. Y.) 102. See also *Hauel v. Mintzer*, 1 Handy (Ohio), 375.

86. *U. S.*—*Leggett v. Humphreys*, 62 U. S. 66, 16 L. Ed. 50.

Ala.—*Coker v. Shropshire*, 59 Ala. 542; *Hopkins v. Scott*, 20 Ala. 179, a deed of trust by a defaulting guardian to indemnify his sureties; *Pennington v. Woodall*, 17 Ala. 685.

Del.—*Tunnell v. Jefferson*, 5 Harr. 206.

Ga.—*Alexander v. Young*, 23 Ga. 616.

Ill.—*Wood v. Clark*, 121 Ill. 359, 12 N. E. 271, *aff'g* 21 Ill. App. 464; *Frank v. Welsh*, 89 Ill. 38; *Cipher v. McFall*, 69 Ill. App. 228.

Ind.—*Owens v. Gascho*, 154 Ind. 225, 56 N. E. 224.

Ky.—*Beatty v. Dudley*, 80 Ky. 381.

Mass.—*Stevens v. Bell*, 6 Mass. 339.

Mich.—*Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719.

Mo.—*Albert v. Besel*, 88 Mo. 150. *N. J.*—*Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391.

Ohio.—*Hauel v. Mintzner*, 1 Handy, 375.

Tex.—*Frees v. Baker*, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340; *Butler v. Sanger*, 4 Tex. Civ. App. 411, 23 S. W. 487.

Vt.—*Spaulding v. Austin*, 2 Vt. 555.

bill of exchange,⁸⁷ or of bail,⁸⁸ may be the subject of a valid preference by a debtor. But merely nominal liability, as that of the sureties on a debtor's official bond as executor, is insufficient to support a preference.⁸⁹

§ 14. **Usurious interest.**—An agreement for usurious interest in the inception of a debt otherwise *bona fide* with no view to its ulterior use for a fraudulent purpose, will not render a transfer of the debtor's property in payment thereof assailable by another creditor,⁹⁰ nor will the validity of a conveyance of property by a debtor to a creditor to prefer a debt be affected by the fact that one of the items of the debt consists of usurious interest which the creditor was compelled to pay to a third person for the purpose of replacing money which the debtor had borrowed and failed to return.⁹¹ But if there is no previous agreement as to the rate of interest, and usurious interest is allowed for the purpose of swelling the debt to an amount not materially less than the value of the property, the transaction should be pronounced fraudulent as to creditors.⁹²

§ 15. **Attorney's fees.**—A transfer of property by a debtor to his attorney, in payment of services rendered, is not invalid as against a judgment creditor, against whose claim the attorney had defended the debtor.⁹³ Attorney's fees which by lawful stipulation are made a part of the debts, in a mortgage given for the benefit of certain creditors, are properly awarded where the contingen-

But see *Sanford v. Wheeler*, 13 Conn. 165, 33 Am. Dec. 389, where a mortgage given both for an existing debt and to indemnify the mortgagee against his liability as surety purports on its face to be given solely for the existing debt, it cannot as against creditors be supported further than to secure the amount actually due.

87. *Perry Ins., etc., Co. v. Foster*, 58 Ala. 502, 29 Am. Rep. 779.

88. *Davis v. Charles*, 8 Pa. St. 82.

89. *Crawford v. Kirksey*, 50 Ala. 590, 55 Ala. 282, 28 Am. Rep. 704.

90. *Harris v. Russell*, 93 Ala. 59, 9 So. 541.

91. *Pennington v. Woodall*, 17 Ala. 685.

92. *Harris v. Russell*, 95 Ala. 59, 9 So. 541; *Lehman v. Greenhut*, 88 Ala. 478, 7 So. 299.

93. *Barker v. Archer*, 49 App. Div. (N. Y.) 80, 63 N. Y. Supp. 298.

cies, upon which they were to become a part of the demand, have occurred.⁹⁴ The fees of an attorney for services for advice given and for preparing and drafting a preferential deed of trust or other conveyance, for advising the trustee as to his duties, and for defending any attacks that may be made on the conveyance, may be included in a preference.⁹⁵ The inclusion of attorney's fees in judgment notes given by an insolvent is fraudulent and void as to other creditors not preferred, but only vitiates the notes *pro tanto*, and equity will follow the fund realized thereon as fees for the benefit of other judgment creditors.⁹⁶

§ 16. **Debts arising out of breach of trust.**—Where an insolvent debtor has misapplied money placed in his hands as a trustee and afterwards replaces the money from his own funds,⁹⁷ or gives security to the beneficiaries to protect the payment of the same,⁹⁸ the transaction is not fraudulent as to creditors. A note and mortgage executed by a guardian to his ward for money or property of the latter which the former had appropriated and for which he was personally responsible is not invalid as against his creditors for want of consideration because the money was secured by the guardian's bond.⁹⁹ But where a debtor, acting as trustee for his minor children, has exercised the discretion imposed on him by the trust, and supported them out of the trust fund, he will not be permitted to restore the sum so expended to the trust estate on a plea that it is his personal duty to support

94. *Martin-Brown Co. v. Siebe*, 6 Tex. Civ. App. 232, 26 S. W. 327.

95. *Mayer v. Templeton* (Tex. Civ. App. 1899), 53 S. W. 68; *Hamilton-Brown Shoe Co. v. Lastinger* (Tex. Civ. App. 1894), 26 S. W. 924; *Butler v. Sanger*, 4 Tex. Civ. App. 411, 23 S. W. 487.

96. *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; *Hulse v. Mershon*, 125 Ill. 52, 17 N. E. 50, *aff'd* *Mershon v. Hulse*, 25 Ill. App.

292; *Bauer Grocer Co. v. McKee Shoe Co.*, 87 Ill. App. 434; *Farmers', etc., Bank v. Spear*, 49 Ill. App. 509.

97. *Jackson v. Spivey*, 63 N. C. 261.

98. *McLaughlin v. Carter*, 13 Tex. Civ. App. 694, 37 S. W. 666; *Middleton v. Pollock*, 2 Ch. D. 104, 45 L. J. Ch. 293.

99. *Jennings v. Jennings*, 104 Cal. 150, 37 Pac. 794.

his children, when by so doing he will evade the payment of his honest debts.¹

§ 17. **Secured debts generally.**—The payment of a debt for which the creditor holds security cannot be held fraudulent, as by the discharge of the debt the security will be released and will become liable to the claims of other creditors.² The giving of additional security for the payment of a claim otherwise secured is held by some authorities not to be fraudulent,³ while others hold that the taking of additional security by one who is otherwise abundantly secured is in itself evidence of fraud, as the creditor will not be permitted to heap security on security unnecessarily to the injury of other creditors.⁴ The burden of upholding such a transaction is on the creditor.⁵ But the fact that a creditor accepts additional security and releases to the debtor the collateral he has been holding does not invalidate the conveyance, as against unsecured creditors, in the absence of proof of fraud, or that the collateral surrendered was negotiable and so not to be reached by creditors.⁶

§ 18. **Discharge of mortgage on homestead.**—An insolvent or failing debtor has a right to pay by way of preference a debt secured by a mortgage on his homestead, and the fact that he can afterwards hold the premises clear of all claims of creditors does not affect that right.⁷ Where a debtor in failing circum-

1. *National Valley Bank v. Hancock*, 100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933, 57 L. R. A. 728.

2. *Lucas v. Clafin*, 76 Va. 269.

3. *Plummer v. Green*, 49 Neb. 316, 68 N. W. 500; *Padgitt v. Porter* (Tex. Civ. App. 1894), 26 S. W. 429; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35.

4. *Lombard v. Dows*, 66 Iowa, 243, 23 N. W. 649; *Crapster v. Williams*, 21 Kan. 109; *Jaffray v. Wolf*, 4 Okla. 303, 47 Pac. 496.

5. *Lombard v. Dows*, 66 Iowa, 243, 23 N. W. 649.

6. *Compton v. Marshall*, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059, 25 S. W. 441; *McGregor v. Chase*, 37 Vt. 225; *Bradley v. Gotzian & Co.*, 12 Wash. 71, 40 Pac. 623.

7. *Randall v. Buffington*, 10 Cal. 491; *Bradley v. Gotzian & Co.*, 12 Wash. 71, 40 Pac. 623. See *Purchase of homestead and payment of liens*, chap. IV, § 45, *supra*.

stances sold to a creditor, already secured by a mortgage on the debtor's homestead, his stock of goods and fixtures, the balance above the debt to be paid to trustees for the benefit of creditors in consideration of his releasing the mortgage on the homestead, it was not a fraudulent conveyance.⁸

§ 19. Transfer of encumbered property in payment of encumbrance.—A transfer of mortgaged property to the mortgage creditor in settlement of a debt much larger in amount than the fair value of the mortgaged property,⁹ or where the fair value of the property is not greater than the debt,¹⁰ is not fraudulent as against the debtor's other creditors,¹¹ since it is not a conveyance to the exclusion or prejudice of the other creditors.¹² And the substitution of other property, on which there was no specific lien in favor of other creditors, in lieu of a part of the mortgaged chattels, will not render the transaction invalid, if the substituted property was received by the mortgagee at a fair valuation.¹³

§ 20. Transfer of all the debtor's property.—The statute in New York prevents an insolvent debtor, by a general assignment, from devoting more than one-third in value of his estate to the payment of preferred creditors. But he may accomplish that result and practically prefer his creditors to as great an extent as his property permits, by omitting to make a general assignment, and instead, giving mortgages and bills of sale or confessing judgments to the more highly favored creditors, in an amount sufficient to exhaust his entire estate. The statute only condemns such preferences when made in a general assignment.¹⁴

8. *Flask v. Tindall*, 39 Ark. 571.

9. *Campodonico v. Oregon Imp. Co.*, 87 Cal. 566, 25 Pac. 763; *Jackson v. Miller*, 32 La. Ann. 432.

10. *Wiggins v. Tumlin*, 96 Ga. 753, 23 S. E. 75.

11. *Morse v. Velzy*, 123 Mich. 532, 82 N. W. 225, under a finding that

the mortgagee had no knowledge that the mortgagor had debts due to others than himself.

12. *Johnson v. Riley*, 41 W. Va. 140, 23 S. E. 698.

13. *Smith v. Hardy*, 36 Wis. 417.

14. *Manning v. Beck*, 129 N. Y. 1, 29 N. E. 90, 14 L. R. A. 198; *London*

But such other means of transfer to preferred creditors cannot be used and employed as a shield so as to hold off all other creditors, while practically returning the property to the possession, and subjecting it to the control of the debtor.¹⁵ As a general rule a transfer of all the debtor's property to pay or secure a valid debt is not fraudulent as to other creditors if the value of the property does not materially exceed the amount of the indebtedness for which it is given in payment or security, and there is no reservation of any trust or benefit for the debtor beyond that which the law, in the absence of contract, would allow him.¹⁶ Under the statute in some states a preferential transfer of sub-

v. Martin, 79 Hun, 229, 29 N. Y. Supp. 396, *aff'd* 149 N. Y. 586, 44 N. E. 1125; Victor v. Levy, 72 Hun, 263. 25 N. Y. Supp. 644, *aff'd* 148 N. Y. 739, 42 N. E. 726; Auburn Exch. Bank v. Fitch, 48 Barb. 344.

15. Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Stimson v. Wrigley, 86 N. Y. 332; Victor v. Levy, *supra*; Abegg v. Schwab, 9 N. Y. Supp. 681.

16. N. Y.—See cases cited in note 14, this section.

U. S.—Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Repauno Chemical Co. v. Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

Ala.—Russell v. Davis, 133 Ala. 647, 31 So. 514, 91 Am. St. Rep. 56, though a failing debtor, prior to the enactment of Code 1896, § 2158, which requires general assignments by debtors to be for the benefit of all creditors, had a right to prefer a creditor to the extent of conveying his entire estate, such conveyance was invalid if not absolute, or if any benefit was reserved to the grantor, or if the property conveyed was materially in excess of the debt, or if the

debt or a portion thereof was fictitious, or if cash was received as a part consideration for the conveyance; Cook v. Thornton, 109 Ala. 523, 20 So. 14; Chipman v. Stern, 89 Ala. 207, 7 So. 409; Carter v. Coleman, 84 Ala. 256, 4 So. 151; Hodges v. Coleman, 76 Ala. 107; Chamberlain v. Dorrance, 69 Ala. 40.

Cal.—In re Muller, 118 Cal. 432, 50 Pac. 660; Dana v. Stanford, 10 Cal. 269.

Del.—Stockley v. Horsey, 4 Houst. 603.

Ga.—McWhorter v. Wright, 5 Ga. 555.

Iowa.—Southern White Lead Co. v. Haas, 73 Iowa, 399, 33 N. W. 657, 35 N. W. 494; Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240, 60 Am. St. Rep. 783; Gage v. Parry, 69 Iowa, 605, 29 N. W. 822; Farwell v. Howard, 26 Iowa, 381; Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137; Cowles v. Ricketts, 1 Iowa, 582.

Kan.—Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; First Nat. Bank v. Ridenour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167.

Mass.—Stephens v. Bell, 6 Mass. 339.

Mo.—Jaffrey v. Mathews, 120 Mo.

stantially all the debtor's property inures to the benefit of all his creditors,¹⁷ while in others the statute does not prevent a debtor from pledging property for the security of part of his creditors only.¹⁸ An agreement by a debtor who is insolvent, and known to be insolvent by a certain creditor, not to make a general assignment, lest it might invalidate, as an unlawful preference, a transfer of the debtor's entire property to the said creditor, shows a fraudulent intent, and renders void the transfer as to other creditors, though made in payment of a *bona fide* indebtedness.¹⁹

§ 21. **Knowledge and intent of parties generally.**—A conveyance or transfer of property by a debtor to a creditor to pay or secure only his own debt is valid, and a creditor may take payment or security for his demand, although others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims.²⁰ In the absence of a statute making it invalid, to render such a preferential transfer invalid, it must have been made with the actual intent to hinder, delay or defraud other

317, 25 S. W. 187; *Crow v. Bardsley*, 68 Mo. 435; *Murry v. Cason*, 15 Mo. 378.

Neb.—*Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527; *Bennett v. McDonald*, 59 Neb. 234, 80 N. W. 826.

Okla.—*Jaffray v. Wolfe*, 1 Okla. 312, 33 Pac. 945.

R. I.—*Elliott v. Benedict*, 13 R. I. 463.

S. C.—*McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86.

Tenn.—*McGrew v. Hancock* (Ch. App. 1899), 52 S. W. 500; *Fidelity, etc., Co. v. O'Brien* (Ch. App. 1896), 38 S. W. 417.

Wash.—*Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256.

Wis.—*Gage v. Chesebro*, 49 Wis. 486, 5 N. W. 881.

Can.—*Brown v. Sweet*, 7 Ont. App. 725.

Eng.—*Alton v. Harrison*, L. R. 4, Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; *Ex parte Games*, 12 Ch. D. 314, 40 L. T. Rep. N. S. 789, 27 Wkly. Rep. 744.

17. *Baxley v. Simmons*, 132 Ala. 117, 31 So. 76. See Statutes of the several States.

18. *Jaffrey v. Mathews*, 120 Mo. 317, 25 S. W. 187; *Crow v. Beardsley*, 68 Mo. 435; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341, *overruling* *Martin v. Hausman* 14 Fed. 160, and cases following it.

19. *Tompkins v. Hunter*, 65 Hun (N. Y.), 441, 20 N. Y. Supp. 355.

20. *Wheaton v. Neville*, 19 Cal. 46; *Dana v. Stanford*, 10 Cal. 269.

creditors,²¹ with the actual design to prevent the application of the whole or a part of the debtor's property to the payment of his debts.²² The intent to satisfy or secure one creditor at the expense of others is not enough.²³ Where there is an actual debt or liability to be discharged or secured a *bona fide* preference is valid, although such preference hinders, delays, or defeats other creditors, and fraud is not to be imputed nor any inference of a fraudulent intent to be drawn from the fact that the debtor desired to and did prefer the creditor, or that the creditor sought to and did obtain a preference to the exclusion of other creditors, or from the fact that it tends to hinder, delay, or defeat creditors. It is not enough that the effect of a conveyance is to delay creditors. It must be executed with such an intent and purpose.²⁴ Where a sale of property by a debtor is made professedly for the purpose of preferring certain creditors, it is presumed to be

21. *U. S.*—Huskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971; Drury v. Cross, 74 U. S. 299, 19 L. Ed. 40; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107.

Cal.—Dana v. Stanford, 10 Cal. 269.

Del.—Stockley v. Horsey, 4 Houst. 603.

Ill.—Ewing v. Runkle, 20 Ill. 448, to render a conveyance void under our statute of frauds and perjuries, both parties must intend to practice a fraud.

N. J.—Green v. McCrane, 55 N. J. Eq. 436, 37 Atl. 318.

N. C.—Hafner v. Irwin, 23 N. C. 490.

Pa.—Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093; Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Jaroslowski v. Simon, 3 Brewst. 37.

22. *Alabama* L. Ins., etc., Co. v. Pettway, 24 Ala. 544; Roberts v. Burr, 135 Cal. 156, 67 Pac. 46, the

fraud contemplated is an actual fraud of which intent is a necessary element; Wheaton v. Neville, 19 Cal. 46; Lucas v. Claffin, 76 Va. 269.

23. *Lucas v. Claffin*, 76 Va. 269.

24. *N. Y.*—Bishop v. Stebbins, 41 Hun, 243; Auburn Exch. Bank v. Fitch, 48 Barb. 344.

U. S.—Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; Tompkins v. Wheeler, 41 U. S. 106, 10 L. Ed. 903; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 204; Repauno Chemical Co. v. Victor Hardware Co., 101 Fed. 948, 42 C. C. A. 106.

Ala.—Warren v. Hunt, 114 Ala. 506, 21 So. 939.

Cal.—Randall v. Buffington, 10 Cal. 491.

Ga.—Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136.

Ill.—Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142, *aff'g* 93 Ill. App. 176; Wood v. Clark, 121 Ill. 359, 12 N. E. 271, *aff'g* 21 Ill. App. 464.

fair and honest.²⁵ Where a debtor has in good faith transferred property to a preferred creditor in payment of an antecedent debt, without reserving to himself any trust or benefit, or exercising any intention to defraud creditors, the fact that he was insolvent at the time and that the effect of the conveyance is to leave the debtor without property to pay his other debts or to so diminish his assets as to actually obstruct or defeat other creditors in the collection of their claims, does not make the conveyance fraudulent. This is only the necessary effect of giving a preference.²⁶ The criterion in determining fraud is not the

Ky.—*Kennaird v. Adams*, 50 Ky. 102.

Me.—*Gardner Nat. Bank v. Hagar*, 65 Me. 359.

Md.—*Rich v. Levy*, 16 Md. 74.

Mich.—*Ferris v. McQueen*, 94 Mich. 367, 54 N. W. 164.

Mo.—*Bell v. Thompson*, 3 Mo. 84; *Derring v. Collins*, 38 Mo. App. 80.

Neb.—*Dempster Mill Mfg. Co. v. First Nat. Bank*, 49 Neb. 321, 68 N. W. 477; *J. T. Robinson Notion Co. v. Foot*, 42 Neb. 156, 60 N. W. 316; *John V. Farwell Co. v. Wright*, 38 Neb. 445, 56 N. W. 984; *Jones v. Loree*, 37 Neb. 816, 56 N. W. 390.

N. H.—*Osgood v. Thorne*, 63 N. H. 375.

N. J.—*Uhl v. Beatty* (Ch.), 3 Atl. 524.

Ohio.—*Sack v. Hemann*, 6 Ohio Dec. 1104, 10 Am. Law Rec. 483.

Pa.—*Candee's Appeal*, 191 Pa. St. 644, 43 Atl. 1093; *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494; *Uhler v. Maulfair*, 23 Pa. St. 481; *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57; *Davis v. Charles*, 8 Pa. St. 82; *Meyers v. Meyers*, 24 Pa. Super. Ct. 603; *Peck v. Spruks*, 6 Lack. Leg. N. 132.

Tenn.—*McGrew v. Hancock* (Ch. App. 1899), 58 S. W. 500.

Tex.—*Owens v. Clark*, 78 Tex. 547, 15 S. W. 101; *Ellis v. Valentine*, 65 Tex. 532; *Lewy v. Fischl*, 65 Tex. 311; *Greenleve v. Blum*, 59 Tex. 124; *Iglehart v. Willis*, 58 Tex. 306.

Va.—*Lucas v. Clafflin*, 76 Va. 269.

Wash.—*West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35.

Wis.—*Haben v. Harshaw*, 49 Wis. 379, 5 N. W. 872.

Eng.—*Middleton v. Pollock*, 2 Ch. D. 104, 45 L. J. Ch. 293.

Contra.—*La.*—*De Blanc v. Martin*, 2 Rob. 38; *Taylor v. Knox*, 2 La. 16; *Misotiere's Syndecs v. Coignard*, 3 Mart. (O. S.) 561.

25. *Wood v. Clark*, 121 Ill. 359, 12 N. E. 271, *aff'g* 21 Ill. App. 464.

26. *U. S.*—*Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107.

Ala.—*Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704.

Cal.—*Dana v. Stanfords*, 10 Cal. 269.

Ind.—*Levering v. Bimel*, 146 Ind. 545, 45 N. E. 775.

Iowa.—*Southern White Lead Co. v. Haas*, 73 Iowa, 399, 33 N. W. 657, 35 N. W. 494.

Mich.—*Geer v. Trader's Bank*, 132 Mich. 215, 93 N. W. 437.

effect of the preference but the intent with which it was made.²⁷ A debtor has a right to prefer one creditor to another and to so dispose of his property that one creditor will receive his pay in full and another will receive nothing.²⁸ For a debtor to dispose of his property so as to prevent one creditor from reaching it is not void on the principles governing conveyances in fraud of creditors, if the property is wholly and unreservedly appropriated to the demands of another creditor.²⁹ A person in failing circumstances may prefer a creditor by conveying to him a part or all of his property, to the exclusion of other creditors, provided it is done in good faith,³⁰ and where a debtor gives a preference to one or more of his creditors, to the exclusion of others, such disposition of his effects is not impeachable on the ground of fraud, even though it embraces all his property, and by the exhaustion of all the property of the debtor to pay the honest debt of the preferred creditor absolutely prevents the other creditors from collecting any part of their claims.³¹ A preference

Mo.—Gaff v. Stern, 12 Mo. App. 115.

Neb.—Blair State Bank v. Bunn, 61 Neb. 464, 85 N. W. 527; Jones v. Loree, 37 Neb. 816, 56 N. W. 390.

N. J.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13.

Pa.—Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Lake Shore Banking Co. v. Fuller, 110 Pa. St. 156, 1 Atl. 731; Bentz v. Rocky, 69 Pa. St. 71; York County Bank v. Carter, 38 Pa. St. 446, 80 Am. Dec. 494.

S. C.—Thorpe v. Thorpe, 12 S. C. 154; Maples v. Maples, Rice Eq. 300.

Tex.—Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; Ellis v. Valentine, 65 Tex. 532; Lewy v. Fischl, 65 Tex. 311; Iglehart v. Willis, 58 Tex. 306; Noyes v. Sanger, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Va.—Lucas v. Claffin, 76 Va. 269.

W. Va.—Harden v. Wagner, 22 W. Va. 356.

Wis.—Stevens v. Breen, 75 Wis. 595, 44 N. W. 645.

27. Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737.

28. Schroeder v. Walsh, 16 Ill. App. 590, *aff'd* 120 Ill. 403, 11 N. E. 70.

29. Hauselt v. Vilmar, 2 Abb. N. C. (N. Y.) 222.

30. Thorton v. Tandy, 39 Tex. 544.

31. *N. Y.*—Auburn Exch. Bank v. Fitch, 48 Barb. 344.

U. S.—Foster v. McAlester, *supra*; Repauno Chemical Co. v. Victor Hardware Co., *supra*.

Cal.—Dana v. Stanfords, 10 Cal. 269.

Kan.—Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; First Nat. Bank v. Ridenour, 46 Kan. 707, 27 Pac. 150, 26 Am. St. Rep. 167.

Neb.—Blair State Bank v. Bunn, 61 Neb. 464, 85 N. W. 527.

by an insolvent debtor of a valid debt and the acceptance thereof by a creditor in satisfaction of his claim is not rendered fraudulent, so as to enable other creditors to avoid the conveyance, although the creditor knows of the debtor's insolvency and both parties know that the effect of such preference will be to deprive the other creditors of the power of satisfying their claims, or to delay or defeat collection thereof.³² Since the debtor when he exercises

Wis.—Gage v. Chesebro, 49 Wis. 486, 5 N. W. 881.

32. *N. Y.*—New York County Nat. Bank v. American Surety Co., 69 App. Div. (N. Y.) 153, 74 N. Y. Supp. 692, *aff'd* 174 N. Y. 544, 67 N. E. 1086; Beards v. Wheeler, 11 Hun, 539; Auburn Exch. Bank v. Fitch, 48 Barb. 344.

U. S.—Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374; Hinskamp v. Moline Wagon Co., *supra*; McCartney v. Earle, 115 Fed. 462; 53 C. C. A. 392, *aff'g* 112 Fed. 372; Wilson v. Jones, 76 Fed. 484; Repauno Chemical Co. v. Victor Hardware Co., *supra*.

Ala.—Cook v. Thornton, 109 Ala. 523, 20 So. 14; Bray v. Ely, 105 Ala. 553, 17 So. 180; Goetter v. Smith, 104 Ala. 481, 16 So. 534; Bates v. Vandiver, 102 Ala. 249, 14 So. 631; Pollock v. Meyer, 96 Ala. 172, 11 So. 385; First Nat. Bank v. Smith, 93 Ala. 97, 9 So. 548; Chamberlain v. Dorrance, 69 Ala. 40; Crawford v. Kirksey, *supra*.

Cal.—Wheaton v. Neville, 19 Cal. 41; Dana v. Stanfords, 10 Cal. 269.

Ill.—Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851.

Ind.—Dice v. Irwin, 110 Ind. 561, 11 N. E. 488.

Iowa.—Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240, 60 Am. Rep. 783. And see Johnson v. McGrew, 11

Iowa, 151, 77 Am. Dec. 137; Cowles v. Ricketts, 1 Iowa, 582.

Mass.—Giddings v. Sears, 115 Mass. 505; Banfield v. Whipple, 96 Mass. 13.

Mich.—Webber v. Webber, 109 Mich. 147, 66 N. W. 960; Ferris v. McQueen, 94 Mich. 367, 54 N. W. 164; Sheldon v. Mann, 85 Mich. 265, 48 N. W. 573.

Mo.—Crothers v. Busch, 153 Mo. 606, 55 S. W. 149, where a debtor transferred her property to a trustee, to secure and prefer one of her creditors, and to hinder others in the collection of their claims, and the trustee and the preferred creditor knew of such purpose, and that such would be the effect of the transfer, but acted only to secure the preference, the transfer was not void as to the other creditors.

Ohio.—Walker v. Walker, 6 Ohio S. & C. Pl. Dec. 355, 4 Ohio N. P. 324.

Or.—Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676.

Pa.—Penn Plate Glass Co. v. Jones, 189 Pa. St. 290, 42 Atl. 189; Werner v. Zierfuss, *supra*; Uhler v. Maulfair, 23 Pa. St. 48; Covanhoven v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

S. C.—McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86.

Tenn.—McGrew v. Hancock, *supra*;

the right to prefer one of his creditors must be conscious that his act of preference will hinder and delay, and possibly defeat, the collection of other demands against him, it may always be said his intention is to hinder and delay the unpreferred creditors, but he cannot be deprived of his right of preference on that ground. The test to be applied is simply whether the debtor, in exercising that right or privilege, acts in good faith, with the intent to pay, or secure the payment of a just indebtedness against him.³³ Fraud is not to be imputed to an honest creditor, who is preferred by a failing debtor as against another creditor, who had been promised payment by the debtor out the proceeds of the same property assigned to the former to secure him,³⁴ even though he had knowledge of this fact.³⁵

§ 22. Participation of preferred creditor in fraudulent intent.

—A failing debtor has a right to protect certain of his creditors in preference to others; and even though the debtor is actuated by an intent to hinder, delay, and defraud other creditors, one creditor has the right to accept payment of his claim in full, or security by a confession of judgment therefor, so long as this is done without knowledge on his part of the fraudulent intent of the debtor, or participation therein.³⁶ And the fact that the creditor has

Johnson v. Goldston (Ch. App. 1899), 52 S. W. 474; *Feder v. Erwin* (Ch. App. 1896), 38 S. W. 446, 36 L. R. A. 335.

Tex.—*Smith v. Whitfield*, 67 Tex. 124, 2 S. W. 822; *Lewy v. Fischl*, *supra*; *Greenleve v. Blum*, *supra*; *Iglehart v. Willis*, *supra*.

Va.—*Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

Wis.—*Gage v. Chesebro*, 49 Wis. 486, 5 N. W. 881. See also *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304.

33. *Nelson v. Leiter*, 190 Ill. 414, 60 N. E. 851; 83 Am. St. Rep. 142, *aff'd* 93 Ill. App. 176.

34. *McKeown v. Coogler*, 18 Fla. 866.

35. *Langert v. David*, 14 Wash. 389, 44 Pac. 875. See *Belding Savings Bank v. Moore*, 118 Mich. 150, 76 N. W. 368, where a mortgage to a creditor was left for delivery with a third person, to be delivered when directed by the mortgagor, and before delivery debtor conveyed the same premises to another creditor, the deed was held not to be fraudulent.

36. *Galle v. Tode*, 148 N. Y. 270, 42 N. E. 673; *Manning v. Beck*, 129 N. Y. 1, 29 N. E. 90, 14 L. R. A. 198; *Starin v. Kelly*, 88 N. Y. 421.

knowledge that the purpose of the debtor is to defeat other creditors does not invalidate the preference, if the pre-existing debt is the sole consideration and the value of the property transferred is not materially in excess of the debt, provided the creditor does not actually participate in the fraud.³⁷ Knowledge on the part of the creditor, however, of the debtor's fraudulent purpose, is held to be equivalent to participation in the fraud where the pre-existing debt is only part of the consideration.³⁸ Where the creditor does not participate in the fraudulent intent of his debtor, but takes the property as security for the sole purpose of satisfying or securing an honest debt, it has been held that his knowledge of the fraudulent intent of the debtor is immaterial.³⁹

§ 23. Preference not invalidated by mere fraudulent intent.—

A conveyance of property to an existing creditor in satisfaction of his debt, which was an adequate consideration, and with an expressed purpose of keeping it from being subjected to another creditor's claim, is not in itself fraudulent.⁴⁰ A preferential conveyance of property to or a judgment obtained by a creditor in payment of or as security for an actual and honest debt, not greater in value or amount than is reasonably sufficient for that purpose, and which has no other effect between the parties than to pay or secure such debt, no interest or benefit being reserved for the debtor, is not void as against other creditors, although the intention of the debtor and the effect of the conveyance or judgment is to hinder and delay other creditors, and the preferred creditor knows that it will have that effect and that the debtor

37. *Dudley v. Danforth*, 61 N. Y. 226. See also Participation in fraudulent intent where debt is sole consideration, chap. XIII, § 9, *infra*.

38. *Levi v. Hamilton*, 68 App. Div. (N. Y.) 277, 74 N. Y. Supp. 159. See also Participation in fraudulent intent where debt is only part of consideration, chap. XIII, § 10, *infra*.

39. *Dudley v. Danforth*, 61 N. Y.

626; *Hasie v. Connor*, 53 Kan. 713, 37 Pac. 128; *Carr v. Briggs*, 156 Mass. 78, 30 N. E. 470; *Banfield v. Whipple*, 96 Mass. 13; *State v. Mason*, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564.

40. *Wilson v. Berger*, 5 St. Rep. (N. Y.) 822; *Clements v. Davis*, 7 Pa. St. 263.

has the intent that it shall have that effect, and he obtains such judgment or conveyance to aid such intent as well as to protect himself. The act of preference being a lawful act and the end accomplished lawful, there is nothing from which fraudulent motives can be inferred, and any fraudulent motives the parties may actually have or whatsoever be the motives of the parties are immaterial.⁴¹ The law condemns motives and intents, only

41. N. Y.—Auburn Exch. Bank v. Fitch, 48 Barb. 344; Brett v. Catlin, 47 Barb. 404; Wilson v. Berger, 5 St. Rep. 822. And see Archer v. O'Brien, 7 Hun, 146, a *bona fide* creditor who takes a transfer of property to secure his debt, and reduces it into his possession, is not affected by an undisclosed intent on the part of the debtor to hinder and delay other creditors, of which he had no notice.

U. S.—Bamberger v. Schoolfield, 160 U. S. 149, 16 Sup. Ct. 225, 40 L. Ed. 374.

Ala.—Beddow v. Sheppard, 118 Ala. 474, 23 So. 662; Pollock v. Meyer, 96 Ala. 172, 11 So. 385; Ellison v. Moses, 95 Ala. 221, 11 So. 347; First Nat. Bank v. Smith, 93 Ala. 97, 9 So. 548; Harris v. Russell, 53 Ala. 59, 9 So. 541; Chipman v. Stern, 89 Ala. 207, 7 So. 409; Carter Coleman, 84 Ala. 256, 4 So. 151; Levy v. Williams, 79 Ala. 171; Hodges v. Coleman, 76 Ala. 103. And see Dawson v. Flash, 97 Ala. 539, 12 So. 67, a conveyance by an insolvent debtor in payment of an antecedent indebtedness honestly due and not materially less than the value of the property conveyed, without reserving any interest or benefit, is valid, although it was made without solicitation and was accepted as a payment only to the extent of the amount realized from the property.

Ill.—Holbrook v. First Nat. Bank, 10 Ill. App. 140.

Pa.—Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; Werner v. Zierfuss, 162 Pa. St. 360, 29 Atl. 737; Covanhoven v. Hart, 21 Pa. St. 495, 60 Am. Dec. 57; Peck v. Sprucks, 6 Lack. Leg. N. 132.

But see Bunn v. Ahl, 29 Pa. St. 387, 72 Am. Dec. 639, where a debtor confessed judgment for an amount honestly due, for the purpose of forcing his other creditors into a compromise of their claims, it is voidable by such creditors, even though not used for that purpose. The giving and receiving judgment is something more than a fraudulent intention; it is something done in pursuance of the intention, and it is voidable by any person in a position to question it.

Tex.—Ellis v. Valentine, 65 Tex. 532; Texas Drug Co. v. Baker, 20 Tex. Civ. App. 684, 50 S. W. 157; Scarborough v. Hilliard (Civ. App. 1894), 28 S. W. 231; Reynolds v. Wienman (Civ. App. 1894), 25 S. W. 33.

Can.—McMaster v. Clare, 7 Grant Ch. (U. C.) 550. And see Attorney-General v. Harmer, 16 Grant Ch. (U. C.) 533.

Eng.—See Wood v. Dixie, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892.

when they are carried into, allied to, or accompanied by, an act which is itself illegal. If the end accomplished be lawful, it is immaterial what may have prompted it, provided the intent itself inflict no personal or pecuniary wrong, and does not aggravate the result. A mere intent accompanied by no illegal act will not give a ground of action.⁴² It has been held that where a preferential sale or conveyance of property by an insolvent debtor to one or more of his creditors is attacked by other creditors as fraudulent the only questions for consideration are: (1) The existence, *bona fides* and amount of the purchasing creditors' claims; (2) whether the sale or conveyance was in absolute payment and satisfaction of the debts at a fair valuation of the property; and (3) whether any benefit or interest was reserved or inured to the debtor,⁴³ and that if these questions are determined in favor of the preference the facts absolutely rebut all inferences that might be drawn from attendant badges of fraud, and impart validity to the conveyance as an allowable preference of the particular creditor.⁴⁴ And in an action of replevin by the grantee of a bill of sale given as security for a precedent debt, against the sheriff holding an attachment at the suit of a creditor of the common debtor, it has been held that the plaintiff is entitled to recover on showing: (1) that there was a valid subsisting indebtedness; (2) that the property was transferred to secure it; and (3) that it was reduced to possession, and that the burden is on the attaching creditor to show notice of fraudulent intent on the part of the debtor if he relies on that.⁴⁵ There are authorities which hold that a transfer

42. *Wilson v. Berger*, 5 St. Rep. (N. Y.) 822; *Carter v. Coleman*, 84 Ala. 556, 3 So. 151. See also *Ellis v. Valentine*, 65 Tex. 532.

The fact that the instrument of transfer contains provisions that would otherwise tend to hinder or delay unsecured creditors in collecting their claims is immaterial where the value of the property conveyed to pay or secure a preferred creditor does not equal the amount of

the debt. *Wade v. Odle*, 21 Tex. Civ. App. 656, 54 S. W. 786.

43. *Fargerson v. Hall*, 99 Ala. Ala. 209, 13 So. 302; *Harris v. Russell*, 93 Ala. 59, 9 So. 541; *Carter v. Cohen*, 84 Ala. 256, 4 So. 151; *Hesse v. Barrett*, 41 Or. 202, 68 Pac. 751.

44. *Hodges v. Coleman*, 76 Ala. 103.

45. *Archer v. O'Brien*, 7 Hun (N. Y.) 146.

of property given by an insolvent debtor to pay or secure a valid debt actually owing by the debtor, in order to be valid, must be made in good faith and with no purpose of defrauding those who are not preferred, and that, if made and accepted with the intent to hinder, delay, or defeat other creditors of the debtor, it is fraudulent and void as against such other creditors.⁴⁶ The fact of the payment of a valuable consideration upon the transfer of the property is not, it is held, as a proposition of law, inconsistent with the existence of an intent to defraud, and in the application of this principle, it is held, no distinction can be made between the consideration furnished by an existing debt and a present consideration, or one arising in any other manner. Hence proof that the conveyance or transfer was made to pay or secure a debt actually owing by the debtor does not, as a matter of law, disprove the existence of a fraudulent intent on the part of the debtor sufficient to enable a creditor to set it aside.⁴⁷ But it is also held that a mere intent to hinder or prevent another creditor from reaching the property is not enough to vitiate a transfer in satisfaction of other actual indebtedness to a creditor to whom the debtor desires to give a preference; that there must be something shown more than a preference given to and accepted by a creditor with the intent to defeat another,⁴⁸ as, for example, an intent to enable the debtor to continue in possession and retain

46. *N. Y.*—Billings v. Russell, 101 N. Y. 226, 4 N. E. 531, *rev'g* 31 Hun, 65; New York Ice Co. v. Cousins, 23 App. Div. 560, 48 N. Y. Supp. 799; Howe v. Sommers, 22 App. Div. 417, 48 N. Y. Supp. 162.

Ga.—Bigby v. Warnock, 115 Ga. 385, 41 S. E. 622, 57 L. R. A. 754; Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176; Conley v. Buck, 100 Ga. 187, 28 S. E. 97; Phinizy v. Clark, 62 Ga. 623.

Ind.—Wynne v. Glidewell, 17 Ind. 446.

Ky.—Ward v. Trotter, 19 Ky. 1.

Mass.—Crowinshield v. Kittridge, 48 Mass. 520.

Mo.—Crow v. Beardsley, 68 Mo. 435; Scott Hardware Co. v. Riddle, 84 Mo. App. 275; Ross v. Ashton, 73 Mo. App. 254.

47. Billings v. Russell, 101 N. Y. 226, 4 N. E. 531.

48. Wilson v. Berger, 5 N. Y. St. Rep. 822, *citing* Auburn Exch. Bank v. Fitch, 48 Barb. 344; Waterbury v. Sturtevant, 18 Wend. 353, and *distinguishing* Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Billings v. Billings, 31 Hun, 65. See also cases cited in note 46, *supra*.

the use and benefit of the property.⁴⁹ It may be said as a general rule that to impeach the payment or securing of an actual debt there should be evidence tending to show either: (1) some other advantage or benefit to the debtor beyond the discharge of his obligation; or (2) some other benefit to the creditor, beyond mere payment of his debt; or (3) some injury to the other creditors beyond mere postponement to the debt preferred.⁵⁰

§ 24. **Secrecy and haste.**—In the absence of a bankrupt or insolvent law, a debtor may lawfully pay one creditor to the exclusion of others, and the fact that the preference is accomplished quickly or secretly, in order to prevent interference, is immaterial.⁵¹ One may be hasty in paying an honest debt and

49. *Billings v. Russell*, 101 N. Y. 226.

50. *Snayberger v. Fahl*, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. Rep. 818; *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737; *Dalley's Estate*, 13 Pa. Super. Ct. 506. See also *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 948, 42 C. C. A. 106.

51. N. Y.—*Thompson v. Fuller*, 8 N. Y. Supp. 62, 5 Silv. Sup. 41.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107, instructions which convey to a jury the impression that secrecy or haste in a transaction by which a debtor secures one of his creditors, or the fact that the giving of such security operates to hinder and delay other creditors, are badges of fraud which place the burden on a secured creditor to sustain the validity of his security, are misleading and erroneous without a full explanation of the legal right of a *bona fide* creditor to obtain security for his debts to the exclusion of

others, if done in good faith; and such instructions are not warranted in any case unless there is other evidence tending to impeach the good faith of the transaction, since such facts are entirely consistent with the exercise by the creditor of his legal rights; *Repauno Chemical Co. v. Victor Hardware Co.*, 101 Fed. 948, 42 C. C. A. 106; *Rice v. Adler-Goldman Commission Co.*, 71 Fed. 151, 18 C. C. A. 15.

Ala.—*Carter v. Coleman*, 84 Ala. 256, 4 So. 151, so long as the law allows a failing debtor to prefer some of his creditors at the expense of others, it permits, if it does not invite, a race of diligence, and no presumption of fraud arises from haste in the transaction; *Hodges v. Coleman*, 76 Ala. 103. See also *Warren v. Hunt*, 114 Ala. 506, 21 So. 939.

Miss.—*Holberg v. Jaffray*, 64 Miss. 746, 2 So. 168.

Pa.—*Candee's Appeal*, 191 Pa. St. 644, 43 Atl. 1093.

Tenn.—*Reeves v. John*, 95 Tenn. 434, 32 S. W. 312.

he is not bound to explain what he is doing. The great question is, was the debt an honest one, and was there an honest transaction intended to pay it.⁵² That a creditor seeking to induce the debtor to convey to him goods for his protection attempts to keep the other creditors from finding out his purpose will not render the sale fraudulent.⁵³ But it has been held that a preference, to be valid, must not be secret, but must be open and fair, without any other object than the act on its face imports.⁵⁴ That a debtor keeps secret and fails to disclose to his other creditors the fact of his indebtedness to the preferred creditor, or the fact that he has entered into an agreement to prefer such creditor, does not constitute a fraud on the other creditors.⁵⁵ But a secret arrangement by a debtor, who compounds with his creditors, to pay one more than he does the others, is a fraud upon the others, and a mortgage given to carry out such an arrangement is void.⁵⁶

§ 25. *Preference pending suit in general.*—A preferential conveyance by a debtor of property at a fair value, in payment of a *bona fide* debt, is not rendered fraudulent and void by the fact that it was made during the pendency of an action by another creditor against the debtor.⁵⁷ In the absence of fraud, a judgment by confession for a just and legal debt will not be set

52. *Thompson v. Fuller*, 8 N. Y. Supp. 62, 5 Silv. Sup. 41.

53. *Rice v. Wood*, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609.

54. *McNeal, etc., Co. v. Plows*, 83 Ill. App. 186; *Hancock v. Horan*, 15 Tex. 507; *Edrington v. Rogers*, 15 Tex. 188.

55. *Robinson v. Hawley*, 45 App. Div. (N. Y.) 287, 61 N. Y. Supp. 138; *Smith v. Munroe*, 1 App. Div. (N. Y.) 77, 37 N. Y. Supp. 62; *McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86.

56. *Harvey v. Hunt*, 119 Mass. 279; *Feldman v. Gamble*, 26 N. J. Eq. 494.

57. *N. Y.*—*Waterbury v. Sturtevant*, 18 Wend. 353.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Vansickle v. Wells*, 105 Fed. 25.

Ala.—*Crawford v. Kirksey*, 50 Ala. 590; *Stetson v. Miller*, 36 Ala. 642; *Williams v. Jones*, 2 Ala. 314.

Ind.—*Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488.

Kan.—*Randall v. Shaw*, 28 Kan. 419.

Ky.—*Kennaird v. Adams*, 11 B. Mon. 102.

Minn.—*Ferguson v. Kumler*, 11 Minn. 104.

Miss.—*Donoghue v. Shull*, 85 Miss. 404, 37 So. 817.

aside simply because it was given by the defendant after obtaining from plaintiff an extension of time to answer in an action then pending.⁵⁸ But where such extension was obtained by promising to pay plaintiff's claim, and that in the meantime there should be no change in the defendant's property, and that no judgment should be entered against him and that plaintiff should not in any way be prejudiced by the delay, a judgment so confessed is fraudulent and void as to the plaintiff.⁵⁹ The fact that when a preference is made by an insolvent debtor there are bankruptcy proceedings pending against him and that the transfer is in violation of the federal bankruptcy act is not material and does not affect the validity of the conveyance in a jurisdiction which permits a preference to be given.⁶⁰

§ 26. Intent to defeat judgment, execution, or attachment.—

A transfer of property at a fair value, in payment of a *bona fide* debt, is not fraudulent under the statute as against an execution subsequently issued by a judgment creditor,⁶¹ and when taken by a creditor for the purpose of protecting himself and not with intent, on his part at least, of defeating the lien of a judgment to be entered on a verdict secured against the debtor, of which he had knowledge, is not fraudulent.⁶² Conveyances in good faith

Mo.—Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212.

N. J.—Doremus v. Daniels (Ch. 1890), 20 Atl. 147; Goodwin v. Hamill, 26 N. J. Eq. 24.

Ohio.—Barr v. Hatch, 3 Ohio, 527.

Pa.—Snayberger v. Fahl, 195 Pa. St. 336, 45 Atl. 1065, 78 Am. St. R. 818.

S. C.—Weinges v. Cash, 15 S. C. 44; Bevins v. Dunham, 1 Speers, 39.

Utah.—Henderson v. Adams (1897), 48 Pac. 398.

Va.—Lucas v. Claflin, 76 Va. 269; Williams v. Lord, 75 Va. 390.

See also Transfers in anticipation of or pending suit, chap. VI, § 7, *supra*.

58. Wood v. Mitchell, 17 N. Y. Supp. 782, *aff'd* 14 N. Y. Supp. 7, 26 Abb. N. Cas. 129.

59. H. B. Claflin Co. v. Arnheim, 87 Hun (N. Y.) 236, 33 N. Y. Supp. 1037, 1 N. Y. Annot. 391.

60. Talcott v. Harder, 119 N. Y. 536, 23 N. E. 1056.

61. Wilder v. Winne, 6 Cow. (N. Y.) 284; Ludlow v. Hurd, 19 Johns. (N. Y.) 218; Weller v. Wayland, 17 Johns. (N. Y.) 102.

62. Hall v. Arnold, 15 Barb. (N. Y.) 599; Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353. *Compare* Stoddard v. Butler, 20 Wend. (N. Y.) 507.

to pay or secure a valid debt by way of preference are not rendered fraudulent by the fact that they were executed under instant apprehension of attachment suits or were made and accepted with the intent to defeat judgments or executions against the debtor and thus prevent other creditors from collecting their claims.⁶³ A conveyance from a debtor to a creditor is not invalid because the debtor made it with the intention of delaying other creditors, although the creditor taking the conveyance knows this, if he took it with the honest purpose of securing his debt. If, however, his purpose was not honest, or if he participated in a fraudulent purpose of the debtor, the rule is otherwise.⁶⁴ A conveyance by a debtor on the eve of judgments being obtained against him is a badge of fraud only and does not necessarily render the conveyance inoperative.⁶⁵ Circumstances may be admitted to explain and justify such a transfer, and when it appears that the transfer was of property for a full and fair price to a creditor, in payment of a just and valid debt, and that the debt is thereby discharged, any presumption of fraud arising from the pendency of the suit is removed.⁶⁶ But a preference secured by a creditor over other creditors by obtaining payment of his debt by suit commenced or judgment secured by collusion with the insolvent debtor, whereby other creditors of the debtor are hindered,

63. *U. S.*—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

Cal.—*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135; *Wheaton v. Neville*, 19 Cal. 41.

Fla.—*Gassett v. Wilson*, 3 Fla. 235.

Ill.—*Funk v. Staats*, 24 Ill. 633.

Ind.—*Steele v. Moore*, 54 Ind. 52.

Mass.—*Carpenter v. Cushman*, 121 Mass. 265.

Mo.—*Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 512.

N. J.—*Goodwin v. Hamill*, 26 N. J. Eq. 24.

Pa.—*Clemens v. Davis*, 7 Pa. St. 263.

Tex.—*Moore v. Robinson* (Civ. App. 1903), 75 S. W. 890; *Frazer v. Thatcher*, 49 Tex. 26.

Va.—*Lucas v. Clafflin*, 76 Va. 269.

Can.—*Gurofski v. Harris*, 27 Ont. 201, *aff'd* 23 Ont. App. 717; *White v. Stevens*, 7 U. C. Q. B. 340.

Eng.—*Alton v. Harrison*, L. R. 4 Ch. 622, 38 L. J. Ch. 669, 21 L. T. Rep. N. S. 282, 17 Wkly. Rep. 1034; *Wood v. Dixie*, 7 Q. B. 892, 9 Jur. 796, 53 E. C. L. 892.

64. *Shelley v. Boothe*, 73 Mo. 74, 39 Am. Rep. 481.

65. *Williams v. Jones*, 2 Ala. 314.

66. *Barr v. Hatch*, 3 Ohio, 527.

delayed, and defrauded, is a fraudulent preference and void.⁶⁷ And a preference given will be held fraudulent in fact, as against the judgment of a creditor, where the transfer was made by the debtor in violation of his agreement with such creditor, and with the obvious intent to deprive the latter of the benefit of a security previously given, or after such creditor had been induced to refrain from entering judgment by the fraudulent representations of the debtor that there would be no change in the property and that the creditor's right should not be in any way prejudiced by the delay.⁶⁸

§ 27. **Agreement to prefer.**—Inasmuch as a failing debtor may legally prefer one or more creditors and the law will uphold such a preference honestly made, and he may make such preference without any antecedent promise, it will not be invalidated because made in pursuance of a valid or invalid agreement honestly made,⁶⁹ nor because such agreement for preferential transfer was conditional, as, for example, to secure the indebtedness whenever demanded,⁷⁰ or to protect the creditor if it should become necessary to do so, or if the debtor should become insolvent.⁷¹ Such facts are merely circumstances from which fraud may be

67. *First Nat. Bank v. Acme White Lead, etc., Co.*, 123 Ala. 344, 26 So. 354.

68. *Robinson v. Hawley*, 45 App. Div. (N. Y.) 287, 61 N. Y. Supp. 138; *H. B. Claffin Co. v. Arnheim*, 87 Hun (N. Y.) 236, 33 N. Y. Supp. 1037, 1 N. Y. Annot. Cas. 391, *distinguishing* *Wood v. Mitchell*, 17 N. Y. Supp. 782.

69. *National Park Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524; *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107; *Fechheimer v. Baum*, 43 Fed. 719, 2 L. R. A. 153; *Smith v. Craft*, 17 Fed. 705, appeal *dismissed* 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267; *Marquese v. Felsenthal*, 58 Ark. 293, 24 S. W. 493; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W.

96. See also *Cooper v. Perdue*, 114 Ind. 207, 16 N. E. 140.

70. *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107.

71. *National Park Bank v. Whitmore*, 104 N. Y. 297, 10 N. E. 524; *Robinson v. Hawley*, 45 App. Div. (N. Y.) 287, 61 N. Y. Supp. 138; *Smith v. Monroe*, 1 App. Div. (N. Y.) 77, 37 N. Y. Supp. 62; *Fechheimer v. Baum*, 43 Fed. 719, 2 L. R. A. 153; *Smith v. Craft*, 17 Fed. 705. But *compare* *Krippendorf v. Hyde*, 28 Fed. 788.

A general assignment is not invalid because it was not filed until four days after it was signed, where it was signed with the understanding that it was not then to be delivered,

inferred as a fact and are proper to be submitted to the jury on the question of fraud.⁷² An agreement providing for the immediate maturity of a debt in case the debtor becomes involved is not fraudulent as to creditors, in the absence of a fraudulent intent.⁷³ But an agreement by a debtor that, in case he becomes insolvent, he will turn over his property to a creditor, is fraudulent as to his other creditors under local insolvency laws.⁷⁴ And a mortgage given to secure advances is none the less an unlawful preference because given in pursuance of an agreement to prefer.⁷⁵

§ 28. **Transfer partly as preference and partly on other consideration.**—Where an insolvent debtor conveys or transfers property to a creditor, partly in payment of an antecedent debt and partly for money paid or loaned at the time, the validity of the transaction as against other existing creditors is to be determined by the rules applicable to a purchase on an entirely new consideration.⁷⁶ The creditor in such a case must pay a reasonably fair price for the property conveyed or transferred and the debtor must not secure or reserve any benefit by the transaction which the law would not secure to him in the absence of a contract.⁷⁷ If these requirements are complied with, in the absence of actual

but only in case the assignors were unable to procure an extension from their creditors. *Pierce Steam Heating Co. v. Ransom*, 16 App. Div. (N. Y.), 258, 44 N. Y. Supp. 623.

The failure to record an agreement by a debtor to prefer a certain creditor in case of insolvency does not render it fraudulent, where such an agreement is not required by law to be recorded, as its record in such case would not constitute notice. *Fechheimer v. Baum*, 43 Fed. 719.

72. *Marquese v. Felsenthal*, 58 Ark. 293, 24 S. W. 493; *Smith v. Craft*, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267.

73. *Teitig v. Boesman*, 12 Mont. 404, 31 Pac. 371.

74. *Chevalier v. Commins*, 106 Cal. 580, 39 Pac. 929.

75. *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475.

76. *Owens v. Hobbie*, 82 Ala. 467, 3 So. 145. See *Transfer to creditor where debt is only part of consideration*, chap. XIII, § 10, *infra*.

77. *Leinkauff v. Frenkle*, 80 Ala. 136, where a creditor, with a demand for \$5,700, purchases his insolvent debtor's entire stock at the gross sum of \$6,200 for which he pays \$1,000 in cash, leaving \$500 of his debt unsatisfied, the transaction is fraudulent as to other creditors.

fraud, a transfer by an insolvent debtor of his property to one of his creditors for a fixed consideration, which the creditor pays in part by discharging his claim, and in part by paying other debts of the grantor or by the payment of money, will be valid as against other creditors.⁷⁸ A conveyance of land to one creditor, to the exclusion of others, the price paid being more than the land with a perfect title is worth, is not rendered fraudulent by the fact that the grantee agreed to pay a sum of money to the wife of the grantor for her separate use; for her relinquishment of her right of dower.⁷⁹ A transfer of property by an insolvent debtor however, to a creditor, who gives a time note for the excess over the amount of his debt thus providing for payment of the balance of the consideration in the future, is invalid, its effect being, as to such excess, to hinder and delay creditors in their lawful actions.⁸⁰ And the same rule has been held to apply where the effect of the transfer is to give the transferee time within which to repay a conceded surplus over the amount of the debt, thereby hindering and delaying creditors of their lawful actions, the parties being held to have intended that effect as the natural, probable, and necessary result of their voluntary act.⁸¹ While a *bona fide* creditor may, with knowledge that the debtor intend to hinder, delay, or defraud other creditors, take the property of the debtor in satisfaction of his claim, and if necessary for

78. *Ala.*—*Gist v. Barrow*, 42 Ark. 521.

Iowa.—*Adams v. Ryan*, 61 Iowa, 733, 17 N. W. 159; *Johnson v. McGrew*, 11 Iowa, 151, 77 Am. Dec. 137.

Mo.—*Cahn v. Groves*, 46 Mo. App. 263.

Vt.—*Lyon v. Rood*, 12 Vt. 233.

Wash.—*Langert v. David*, 14 Wash. 389, 44 Pac. 875.

In Texas, though a failing debtor may prefer a creditor, he cannot transfer his property to such creditor, receiving a partial money consideration therefor, and so cut off the

rights of other creditors. Such a transfer will be set aside not only as to the excess in value, but as to all the property transferred. *Black v. Vaughan*, 70 Tex. 47, 7 S. W. 604; *Seligson v. Brown*, 61 Tex. 180; *Greenleve v. Blum*, 59 Tex. 124.

79. *Marshall v. Hutchinson*, 44 Ky. 298.

80. *Brinson v. Edwards*, 94 Ala. 447, 10 So. 219; *Elser v. Graber*, 69 Tex. 222, 6 S. W. 560.

But see *Langert v. David*, 14 Wash. 389, 44 Pac. 875.

81. *Seger v. Thomas*, 107 Mo. 635, 18 S. W. 33.

this purpose make a cash payment to the debtor of the difference between the debt and the value of the property, yet the transaction must not be for the purpose of conferring a benefit upon the debtor, and the cash payment made must be necessary in order to effectuate the transfer or the collection of the debt.⁸²

§ 29. **Where present consideration is exempt.**—Where a debtor sells his property at a fair value and receives payment partly in the discharge of an antecedent debt and partly for a present consideration, either in money or notes of the purchaser, if the present consideration, together with the remaining property of the debtor, do not exceed in value the amount of the exemption to which he is entitled, the effect of the transaction is to make an authorized preference among the seller's creditors, and secure to him a sum of money which is not liable to his other debts; and the fact that the money or notes were taken in part payment of the purchase does not render the transaction fraudulent, since, as the money or notes were included in the exemption, the change was merely in the form of the property exempted, and did not therefore involve any prejudice to the rights of creditors.⁸³ The debtor in such case must be shown to be a resident of the state and thus entitled to the exemption.⁸⁴

§ 30. **Present consideration to be paid by debtor to other creditors.**—A sale by an insolvent debtor of his property at a fair valuation partly in absolute payment of a *bona fide* debt, no benefit being reserved to himself, and partly for a present consideration, is not rendered fraudulent by the fact that it was stipulated that the present consideration should be applied on the debts of another *bona fide* creditor, and that it was so ap-

82. *Sly v. Bell* (Iowa, 1906), 108 N. W. 227, where a transaction was held voidable at the suit of the creditors, inasmuch as the cash payment was unnecessary because the difference covered by the cash payment could have been avoided by omitting

some of the property, consisting of cattle, horses and farm implements, from the sale.

83. *Fargerson v. Hall*, 99 Ala. 209, 14 So. 302; *Brinson v. Edwards*, 94 Ala. 447, 10 So. 219.

84. *Brinson v. Edwards*, *supra*.

plied.⁸⁵ Such a stipulation is not objectionable as being a reservation of a benefit to the debtor.⁸⁶

§ 31. **Other debts assumed by transferee.**—A *bona fide* preferential sale or transfer of property by an insolvent or failing debtor to a creditor, in consideration of the cancellation of a debt due by the debtor to the creditor, or to secure the payment of such a debt, is valid, as against the unpreferred creditors, although the vendee or grantee also agrees, as part of the consideration or as further consideration, to pay, or assumes the payment of, debts owing by the debtor to certain other creditors, or to pay a certain sum on such debts as the debtor may direct.⁸⁷ The rule applies although the conveyance is of all the debtor's property,⁸⁸ and al-

85. *Fargerson v. Hall*, 99 Ala. 209, 13 So. 302; *Carter v. Coleman*, 84 Ala. 256, 4 So. 151; *Moog v. Farley*, 79 Ala. 246, when it is not shown that the grantee had knowledge of the grantor's insolvency; *Rankin v. Vandiver*, 78 Ala. 562.

86. *Rankin v. Vandiver*, 78 Ala. 562. See Reservation of power to direct application of surplus proceeds, chap. X, § 9, *supra*.

87. *N. Y.*—*Hine v. Bowe*, 114 N. Y. 350, 21 N. E. 733, *aff'g* 46 Hun, 196; *Carpenter v. Muren*, 42 Barb. 300, mortgage.

U. S.—*Randolph v. Allen*, 73 Fed. 23, 19 C. C. A. 353.

Ala.—*Goetter v. Smith*, 104 Ala. 481, 16 So. 534; *Dixon v. Higgins*, 82 Ala. 284, 2 So. 289.

Cal.—*Saunderson v. Broadwell*, 82 Cal. 132, 23 Pa. 36.

Conn.—*Koster v. Merritt*, 82 Conn. 246, such a sale is not void as preferring creditors, if, under the laws of the State where the sale is made such preferences are not invalid.

Ill.—*Ewing v. Runkle*, 20 Ill. 448, where such a transfer was made with

the consent of other creditors, the consenting creditors were bound by it.

Ind.—*Wilcoxson v. Annesley*, 23 Ind. 285.

Iowa.—*Lycoming Rubber Co. v. King*, 90 Iowa, 343, 57 N. W. 864, mortgage; *Johnson v. McGrew*, 11 Iowa, 151, 77 Am. Dec. 137.

N. J.—*Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391.

Pa.—*York County Bank v. Carter*, 38 Pa. St. 446, 80 Am. Dec. 494.

Tenn.—*Johnson v. Coldston* (Ch. App. 1899), 51 S. W. 474, where all of the transferrer's debts were assumed by the transferee, who paid some of them and became liable for the rest.

Tex.—*Jacobs v. Totty*, 76 Tex. 343, 13 S. W. 372; *Noyes v. Sanger*, 8 Tex. Civ. App. 388, 27 S. W. 1022.

Va.—*Janney v. Burnes*, 11 Lei. 100.

Wis.—*Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304.

Compare *Foster v. Grigsby*, 64 Ky. 86; *Smith v. Conkwright*, 28 Minn. 23, 8 N. W. 876.

88. *Chipman v. Stern*, 89 Ala. 207, 7 So. 409; *Johnson v. McGrew*, 11 Iowa, 151.

though the transaction results in the preference of the creditors the payment of whose claims is thus assumed, or such preference is stipulated for by the parties, since the debtor has a legal right to direct the application of the surplus and to give preferences therefrom.⁸⁹ There is no reason why the debtor may not as well direct the payment of the surplus of the consideration by the purchaser upon his debts, as to take the money and pay it on them himself.⁹⁰ Where there is a complete novation, the substitution of a new obligation for an old one, which is thereby extinguished, the debtor being released and the other creditors accepting the obligation of the purchasing creditor in the place of that of the debtor, the transaction is not fraudulent.⁹¹ A stipulation whereby the right is reserved to the debtor to direct what claims shall have preference as to payment from the surplus is not objectionable as being a reservation of a benefit to him.⁹² But a stipulation that the transferee or vendee shall have power to prefer creditors of the debtor at his discretion will render the conveyance or transfer invalid.⁹³

§ 32. **Creditor's promise to compound felony.**—A transfer of property by an insolvent debtor in payment of a debt is not fraudulent in law, within a statute providing for the reaching of property fraudulently conveyed by a debtor with intent to defeat, delay or defraud creditors, merely because the compounding of a felony was a part of the transaction.⁹⁴

89. N. Y.—Hine v. Bowe, *supra*.

U. S.—Randolph v. Allen, *supra*.

Ala.—Goetter v. Smith, *supra*.

Ind.—Wilcoxson v. Annesley, *supra*.

Iowa.—Lycoming Rubber Co. v. King, *supra*.

Wis.—Ingram v. Osborn, *supra*.

90. Hine v. Bowe, *supra*; Royer Wheel Co. v. Fielding, 101 N. Y. 504.

91. McCann v. Dillabaugh, 117 Mich. 446, 75 N. W. 929, *distinguishing* Hill v. Mallory, 112 Mich. 387, 70 N. W. 1016; Allen v. Stingel, 95

Mich. 195, 54 N. W. 880.

92. Hine v. Bowe, *supra*; Goetter v. Smith, *supra*. See also Reservation of power to direct application of surplus proceeds, chap. X, § 9, *supra*.

93. Strong v. Skinner, 4 Barb. (N. Y.) 546; Boardman v. Halliday, 10 Paige (N. Y.), 223; Barnum v. Hempstead, 7 Paige (N. Y.), 568. See also Delegation of power to prefer, chap. XI, § 9, *supra*.

94. Traders' Nat. Bank v. Steere,

§ 33. **Preferences between relatives generally.**—A conveyance of property by an insolvent debtor to relatives in discharge of an indebtedness to them, made in good faith, is valid as against the grantor's other creditors, being only a preference given by him to the claim of his relatives over that of the others.⁹⁵ Transactions between relatives whereby property is transferred from one creditor to another in payment of an alleged past-due indebtedness, by reason of which other creditors are deprived of their just dues, will, however, be scrutinized very closely, and the *bona fides* of such transactions must be clearly established.⁹⁶ Relationship is not a badge of fraud, though it may require that the dealings of the parties be treated with suspicion; but suspicion is not proof of fraud. Fraud must be proved not by surmise, but by evidence which rises above the realm of mere suspicion, and to the dignity of proof; otherwise it would be next to impossible to sustain transactions between near relatives upon any other theory. In the absence of actual fraud, a preference given for a valid subsisting debt by a debtor to a member of his family or other relative is as valid as if made to any other creditor.⁹⁷ There is no law

165 Mass. 389, 43 N. E. 187. And see *In re Mapleback*, 4 Ch. D. 150, 13 Cox C. C. 374, 35 L. T. R. N. S. 503, 25 Wkly. Rep. 103.

95. *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584.

96. *Fisher v. Herron*, 22 Neb. 183, 34 N. W. 365.

97. *N. Y.*—*Lindsley v. Van Cortlandt*, 67 Hun, 145, 22 N. Y. Supp. 222, *aff'd* 142 N. Y. 682, 37 N. E. 825; *Toffey v. Williams*, 5 Thomp. & C. 294.

U. S.—*Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Walker v. Houghteling*, 120 Fed. 928, 57 C. C. A. 218; *Corwine v. Thompson Nat. Bank*, 105 Fed. 196, 44 C. C. A. 442; *Vansickle v.*

Wills, 100 Fed. 25; *Hinchman v. Parlin*, 74 Fed. 698, 21 C. C. A. 273, 41 U. S. App. 301; *Buford v. Cook*, 36 Fed. 21.

Ala.—*Worthington v. Rogan* (1898), 26 So. 299; *Owens v. Hobbie*, 82 Ala. 467, 3 So. 145; *Crawford v. Kirksey*, 50 Ala. 290.

Ark.—*Hemstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458.

Cal.—*Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46.

Ill.—*Schuberth v. Schillo*, 177 Ill. 346, 52 N. E. 319, *aff'd* 76 Ill. App. 356; *Victor v. Swisky*, 87 Ill. App. 583.

Ind.—*Rockland County v. Summerville*, 139 Ind. 695, 39 N. E. 307; *Adams v. Curtis*, 137 Ind. 175, 36 N.

which forbids persons standing in near relations of consanguinity, affinity, or business, from dealing with each other, or which requires them to conduct their business with each other differently from the manner in which they conduct it with other persons.⁹⁸ In accordance with the general rules stated in the first section of this chapter, a debtor has a legal right to give a preference for a *bona fide* debt to his father,⁹⁹ to his mother,¹ to his brother,² to

E. 1095; *Jones v. Snyder*, 117 Ind. 229, 20 N. E. 140; *Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 513; *Goff v. Rogers*, 71 Ind. 459.

Iowa.—*Roberts v. Brothers*, 119 Iowa, 309, 93 N. W. 289; *Brooks v. Jones* (1900), 82 N. W. 434; *Stroff v. Swafford*, 81 Iowa, 695, 47 N. W. 1023; *Rockford Boot, etc., Mfg. Co. v. Mastin*, 75 Iowa, 112, 39 N. W. 219; *Wise v. Wilds*, 47 Iowa, 586, 42 N. W. 553.

Kan.—*Winfield Nat. Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *Bliss v. Couch*, 46 Kan. 400, 26 Pac. 706; *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937.

Ky.—*Stokes v. Coffey*, 71 Ky. 533; *Young v. Stallings*, 44 Ky. 307.

Md.—*Commonwealth Bank v. Kearns*, 100 Md. 202, 59 Atl. 1010.

Mich.—*Webber v. Webber*, 109 Mich. 147, 66 N. W. 960; *Leppig v. Bretzel*, 48 Mich. 321, 12 N. W. 199.

Miss.—*Donoghue v. Shull*, 85 Miss. 404, 37 So. 817.

Mo.—*Ridge v. Greenwell*, 53 Mo. App. 479.

Neb.—*Blair State Bank v. Bunn*, 61 Neb. 464, 85 N. W. 527; *Farrington v. Stone*, 35 Neb. 456, 53 N. W. 389.

N. J.—*Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584.

Ohio.—*Thacker v. Newall*, 7 Ohio Dec. (Reprint) 576, 3 Cinc. L. Bul. 1159.

Or.—*Hesse v. Barrett*, 41 Or. 202, 68 Pac. 751; *Feldman v. Nicolai*, 28 Or. 34, 40 Pac. 1010; *Jolly v. Kyle*, 27 Or. 95, 39 Pac. 999.

Pa.—*Candee's Appeal*, 191 Pa. St. 644, 43 Atl. 1093; *Kitchen v. McCloskey*, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811; *Collins v. Cronin*, 117 Pa. St. 35, 11 Atl. 869.

S. C.—*Mechanics' Bldg., etc., Assoc. v. Fowler*, 57 S. C. 110.

S. D.—*Studebaker Mfg. Co. v. Zollars*, 12 S. D. 296, 81 N. W. 292.

Tenn.—*Miller v. Winton* (Ch. App. 1900), 56 S. W. 1049; *Maryville Bank v. Thorton* (Ch. App. 1895), 35 S. W. 565.

Va.—*Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

Eng.—*Grogan v. Cooke*, 2 Ball & B. 234.

98. *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497.

An insolvent private manufacturing corporation may prefer its directors, or creditors on whose claims the directors are sureties, though their votes are necessary therefor, and though loss is thereby caused to persons having claims against the corporation, the directors owing no duty to creditors. *Napanee Canning Co. v. Reid*, 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199.

99. *N. Y.*—*Lindsley v. Van Cort-*

his sister,³ or to his child,⁴ to the same extent as he might prefer other creditors. Where there is no fraud, parents may lawfully

landt, 67 Hun, 145, 22 N. Y. Supp. 222, *aff'd* 142 N. Y. 682, 37 N. E. 825.

Ind.—Rockland County v. Summer-ville, 139 Ind. 695, 39 N. E. 307; Mc-Fadden v. Ross, 126 Ind. 341, 26 N. E. 78.

Iowa.—First Nat. Bank v. Bru-baker, 128 Iowa, 587, 105 N. W. 116.

Mich.—State Bank v. Whittle, 48 Mich. 1, 11 N. W. 756.

Minn.—Ferguson v. Kumler, 11 Minn. 104.

Neb.—Peregoy v. Krantz, 31 Neb. 58, 47 N. W. 422.

1. Leach v. Flack, 31 Hun (N. Y.), 605; Auburn Exch. Bank v. Fitch, 48 Barb. (N. Y.) 344; Roberts v. Burr, 135 Cal. 156, 67 Pac. 46; Coley v. Coley, 14 N. J. Eq. 350; Jones v. Naughtright, 10 N. J. Eq. 298; Lloyd v. Williams, 21 Pa. St. 327.

2. *Ala.*—Moog v. Farley, 79 Ala. 246.

Cal.—Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36.

Colo.—Krippendorf-Dittman Co. v. Trenoweth, 16 Colo. App. 178, 64 Pac. 373.

Iowa.—Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159.

Ky.—Shaw v. Shaw, 15 Ky. L. Rep. 592, 24 S. W. 630.

Pa.—Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811. See also Candee's Appeal, 191 Pa. St. 644, 43 Atl. 1093, where one member of a debtor firm was a brother of a member of the creditor firm.

S. C.—Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 879, 76 Am. St.

Rep. 551; Thorpe v. Thorpe, 12 S. C. 154.

3. Toffey v. Williams, 5 Thomps. & C. (N. Y.) 294; Cahn v. Groves, 46 Mo. App. 263.

4. *N. Y.*—National Bank v. Port Jervis v. Bonnell, 26 Misc. Rep. 541, 57 N. Y. Supp. 486; Hyde v. Houston, 29 N. Y. Supp. 818.

U. S.—Micou v. First Nat. Bank, 104 U. S. 530, 26 L. Ed. 834; Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675.

Ind.—Clow v. Brown (1904), 72 N. E. 534.

Iowa.—Riddick v. Parr, 111 Iowa, 733, 82 N. W. 1002; Sands v. Pier-son, 61 Iowa, 702, 17 N. W. 107.

Kan.—Pettyjohn v. Newhart, 7 Kan. App. 64, 51 Pac. 969; Nurray v. First Nat. Bank, 5 Kan. App. 456, 49 Pac. 326.

Ky.—Seiler v. Walz, 100 Ky. 105, 29 S. W. 338, 31 S. W. 729, 17 Ky. L. Rep. 301; Caldwell v. Deposit Bank, 18 Ky. L. Rep. 156, 35 S. W. 625; Spurrier v. Haley, 4 Ky. L. Rep. 364.

Md.—Thompson v. Williams, 100 Md. 195, 60 Atl. 26.

Miss.—Donly v. Ray (1889), 6 So. 324.

Mo.—Lillard v. Johnson, 148 Mo. 23, 49 S. W. 889; Ridge v. Green-well, 53 Mo. App. 479.

Neb.—Carson v. Murphy, 1 Neb. (Unoff.) 519, 96 N. W. 110.

N. J.—Doremus v. Daniels (Ch. 1890), 20 Atl. 147.

Tenn.—Nelson v. Kinney, 93 Tenn. 428, 25 S. W. 100.

Wis.—Barr v. Church, 82 Wis. 382, 52 N. W. 591.

Can.—Gurofski v. Harris, 27 Ont.

receive pay or take security from their son, who is indebted to them, though they know that the result will be to delay or defeat his other creditors.⁵ Where a father emancipates his child so that his earnings belong to him and thereafter borrows the same from him, a conveyance from the father to the child to repay the same is not fraudulent as to existing creditors of the father.⁶ As a general rule a transfer of property by an insolvent debtor to a relative, which has the effect of hindering or delaying other creditors in the collection of their debts, will be subjected to greater scrutiny than if the parties to the conveyance were strangers, though it will be sustained if made in good faith and for an adequate consideration.⁷ Where a debtor prefers a creditor related by blood or marriage, clearer proof of good faith is required than in case of strangers,⁸ and the *bona fides* of such transaction must be clearly established.⁹

201, *aff'd* 23 Ont. App. 717; Smith v. Wright, 2 N. Brunsw. Eq. 528.

5. First Nat. Bank v. Brubaker, 128 Iowa, 587, 105 N. W. 116.

6. McCaffrey v. Hickey, 66 Barb. (N. Y.) 489; Flynn v. Baisley, 35 Or. 268, 57 Pac. 908, 76 Am. St. Rep. 495, 45 L. R. A. 645; Bomar v. Means, 53 S. C. 232, 31 S. E. 234; Rosenbaum v. Davis (Tenn. Ch. App. 1898), 48 S. W. 706. See also Wages of debtor's minor child, chap. IV, § 10, *supra*; Earnings of minor child, chap. VIII, § 57, *supra*.

7. N. Y.—Lindsley v. VanCortlandt, 67 Hun, 145, 22 N. Y. Supp. 222, *aff'd* 142 N. Y. 682, 37 N. E. 570.

Ala.—Russell v. Davis (1901), 35 So. 514; Calhoun v. Hannon, 87 Ala. 277, 6 So. 291; Moog v. Farley, 79 Ala. 246.

Md.—Commonwealth Bank v. Kearns, 100 Md. 202, 59 Atl. 1010.

Neb.—Blair State Bank v. Bunn, 61 Neb. 464, 85 N. W. 527; Stein-

kraus v. Korth, 44 Neb. 777, 62 N. W. 1110; Farrington v. Stone, 35 Neb. 456, 53 N. W. 389.

N. C.—Mitchell v. Eure, 126 N. C. 77, 35 S. E. 190; Allen v. McLendon, 113 N. C. 321, 18 S. E. 206.

Or.—Feldman v. Nicolai, 28 Or. 34, 40 Pac. 1010; Jolly v. Kyle, 27 Or. 95, 39 Pac. 999.

Pa.—Lloyd v. Williams, 21 Pa. St. 327.

Va.—Johnson v. Lucas, 103 Va. 36, 48 S. E. 497.

8. Schloss v. McGuire, 102 Ala. 626, 15 So. 275; Smith v. Collins, 94 Ala. 394, 10 So. 334; Owens v. Hobbie, 82 Ala. 467, 3 So. 145.

9. Calhoun v. Hannan, 87 Ala. 277, 6 So. 291; Bonwit v. Heyman, 43 Neb. 537, 61 N. W. 716; Plummer v. Rummel, 26 Neb. 142, 42 N. W. 336; Bartlett v. Cheesbrough, 23 Neb. 767, 37 N. W. 652; Brooks v. Todd, 1 Handy (Ohio), 169, 12 Ohio Dec. (Reprint) 84, the parties must have acted with the most scrupulous

§ 34. **Preference of husband and wife.**—It is quite generally held by the courts that, inasmuch as dealings between husband and wife which result in the appropriation of the husband's property for the payment of a debt claimed to be due the wife, to the exclusion of other creditors, furnish uncommon opportunities for the perpetration and concealment of fraud, they should be carefully and rigidly scrutinized, especially when charged to be fraudulent.¹⁰ Yet it is a well established rule that where a wife is a *bona fide* creditor of her husband, she is entitled to security or payment, the same as any other creditor; and, although the husband is insolvent or in failing circumstances, he may in good faith prefer her, either by payment of money or the conveyance of property still under his control, or by giving security, to the exclusion of other creditors, the same as he may prefer any other creditor, and such a preference is not of itself fraudulent, and will not be set aside as in fraud of the other creditors of the husband, unless there is proof of a fraudulent intent on the part of the husband.¹¹ The same principles apply

good faith, taking care that no unjust or unnecessary delay or hindrance is offered to the rights of others.

Transactions held fraudulent as to unsecured creditors.—Arnold v. Wilds, 77 Iowa, 593, 42 N. W. 555; Wise v. Wilds, 77 Iowa, 586, 42 N. W. 553.

10. White v. Benjamin, 150 N. Y. 258, 44 N. E. 956; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; Hollis v. Rodgers, 106 Ga. 13, 31 S. E. 783; Vietor v. Swiskey, 200 Ill. 257, 65 N. E. 625; Sutton v. Guthrie, 188 Pa. St. 359, 41 Atl. 528; McElwee v. Kennedy, 56 S. C. 154, 34 S. E. 86; Hairston v. Hairston, 35 S. C. 298, 14 S. E. 634. See also Transactions between persons in confidential re-

lations—Husband and wife, chap. IX, § 4, *supra*.

11. N. Y.—Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; Baker v. Georgi, 10 App. Div. 249, 41 N. Y. Supp. 1030; First Nat. Bank v. Hamilton, 76 Hun, 613, 27 N. Y. Supp. 1029; Jewett v. Noteware, 30 Hun, 192; Woodworth v. Sweet, 44 Barb. 268, *aff'd* 51 N. Y. 8; Doty v. Clint, 11 St. Rep. (N. Y.) 87.

U. S.—New York Fourth Nat. Bank v. American Mills Co., 137 U. S. 234, 11 Sup. Ct. 52, 34 L. Ed. 655; Jewell v. Knight, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190; Magniac v. Thompson, 7 Pet. 348, *aff'g* 16 Fed. Cas. No. 8,956, Baldw. 344; Vansickle v. Wells, 105 Fed.

between husband and wife as between any other persons occupy-

16; *Hinchman v. Parlin, etc., Co.*, 74 Fed. 698, 21 C. C. A. 273.

Ala.—*Beddow v. Sheppard*, 118 Ala. 474, 23 So. 662; *National Bank of Republic v. Dickinson*, 107 Ala. 265, 18 So. 144; *Kilgore v. Stoner* (1892), 12 So. 60; *Whaun v. Atkinson*, 84 Ala. 592, 4 So. 681; *Northington v. Faber*, 52 Ala. 45.

Cal.—*Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46.

Colo.—*First Nat. Bank v. Kavanagh*, 7 Colo. App. 160, 43 Pac. 217; *Stramann v. Scheeren*, 7 Colo. App. 1, 42 Pac. 191.

Fla.—*Hill v. Meinhard*, 39 Fla. 111, 21 So. 805.

Ga.—*Simms v. Tidwell*, 98 Ga. 686, 25 S. E. 555; *Comer v. Allen*, 72 Ga. 1.

Ill.—*German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172, 52 L. R. A. 283, *aff'd* 89 Ill. App. 469; *Tomlinson v. Matthews*, 98 Ill. 178; *Earl v. Earl*, 186 Ill. 370, 57 N. E. 1079, *rev'd* 87 Ill. App. 491; *Cooke v. Peter*, 93 Ill. App. 1; *Cartwright v. Cartwright*, 68 Ill. App. 74; *Hensley v. Hensley*, 65 Ill. App. 195; *Hughes v. Bell*, 62 Ill. App. 74; *Fleming v. Weagley*, 32 Ill. App. 183.

Ind.—*Brigham v. Hubbard*, 115 Ind. 474, 17 N. E. 920; *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488; *Hoes v. Royer*, 108 Ind. 494, 9 N. E. 427; *Bragg v. Stanford*, 82 Ind. 234; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Kyger v. F. Hull Skirt Co.*, 34 Ind. 249.

Iowa.—*Clark v. Ford*, 126 Iowa, 460, 102 N. W. 421; *Meredith v. Schaap* (1901), 85 N. W. 628; *Muir v. Miller*, 103 Iowa, 127, 72 N. W.

409; *Sprague v. Benson*, 101 Iowa, 678, 70 N. W. 731; *Fowler Co. v. McDonnell*, 100 Iowa, 536, 69 N. W. 873; *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310.

Kan.—*Fuller v. Croco*, 46 Kan. 634, 26 Pac. 944; *Winfield Nat. Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *De Ford v. Nye*, 40 Kan. 665, 20 Pac. 481; *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937; *Chapman v. Summerfield*, 36 Kan. 610, 14 Pac. 235; *Miller v. Krueger*, 36 Kan. 344, 13 Pac. 641; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606.

Ky.—*Taylor v. Cooley*, 20 Ky. L. Rep. 1365, 49 S. W. 335. See also *Cochran v. Rennison*, 23 Ky. L. Rep. 2326, 67 S. W. 5; *McCandless v. Rea*, 21 Ky. L. Rep. 1687, 56 S. W. 10.

Me.—*Ferguson v. Spear*, 65 Me. 277; *French v. Motley*, 63 Me. 326.

Md.—*Crane v. Barkdoll*, 59 Md. 534.

Mass.—*Atlantic Nat. Bank v. Taverner*, 130 Mass. 407, where the conveyance was made through a third person.

Mich.—*Cole v. Cole*, 126 Mich. 569, 85 N. W. 1098; *Strauss v. Parshall*, 91 Mich. 475, 51 N. W. 1117; *Dull v. Merrill*, 69 Mich. 49, 36 N. W. 677; *Leppig v. Bretzel*, 48 Mich. 321, 12 N. W. 199; *Hyde v. Powell*, 47 Mich. 156, 10 N. W. 181; *Jordan v. White*, 38 Mich. 253; *Allen v. Antisdale*, 38 Mich. 229; *Hill v. Bowman*, 35 Mich. 191.

Minn.—*Frost v. Steele*, 46 Minn. 1, 48 N. W. 413.

Miss.—*Savage v. Dowd*, 54 Miss. 728. And see *Magnum v. Finucane*, 38 Miss. 354.

ing the relation of debtor and creditor toward each other,¹² and a married woman who has a *bona fide* claim against her husband is entitled to the same legal rights as any other creditor, except as to remedy.¹³ The validity of a preference by an insolvent husband to his wife is not affected by the fact that it was for money loaned by the wife from the proceeds of her separate estate, which had been previously given to her by her husband, when he was solvent and it was not done in fraud of creditors, prior or subsequent,¹⁴

Mo.—See *Third Nat. Bank v. Cramer*, 78 Mo. App. 476.

Mont.—*Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063.

Neb.—*Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *Ward v. Parlin*, 30 Neb. 376, 46 N. W. 529.

N. J.—*Talcott v. Arnold*, 54 N. J. Eq. 570, 35 Atl. 532; *Brock v. Hudson County Nat. Bank*, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451.

Or.—*Sabin v. Wilkins*, 31 Or. 450, 48 Pac. 425, 37 L. R. A. 465.

Pa.—*Benson v. Maxwell* 105 Pa. St. 274, 10 Pa. Cas. 380, 14 Atl. 161; *Lahr's Appeal*, 90 Pa. St. 507; *Matter of Bradway*, 1 Ashm. 212.

S. C.—*McElwee v. Kennedy*, 56 S. C. 154, 34 S. E. 86; *McGhee v. Wells*, 52 S. C. 472, 30 S. E. 602; *Gerald v. Gerald*, 28 S. C. 442, 6 S. E. 290.

Tex.—*McCrary v. Lutz*, 94 Tex. 650, 64 S. W. 780; *Thompson v. Wilson*, 24 Civ. App. 666, 60 S. W. 354; *Massie v. McKee* (Civ. App. 1900), 56 S. W. 119; *Jacobs v. Womack* (Civ. App. 1894), 26 S. W. 431.

W. Va.—*Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; *Cale's Adm'r v. Shaw*, 33 W. Va. 299, 10 S. E. 637.

Wis.—*Brickley v. Walker*, 68 Wis. 563, 22 N. W. 773.

Can.—*Fair v. Young*, 26 Grant Ch. (U. C.) 544.

Conveyance regarded as mortgage.—A conveyance to a wife by a husband in failing circumstances is not absolutely void as against creditors, but is valid as a mortgage, where the facts were that she had borrowed money for him on her property on condition that he would make the conveyance as security. *Baker v. Georgi*, 10 App. Div. (N. Y.) 249, 41 N. Y. Supp. 1030. And see *Brock v. Hudson County Nat. Bank*, 48 N. J. Eq. 615, 23 Atl. 269, 27 Am. St. Rep. 451.

Failure of the wife to make her claim known will not deprive her of her rights as a creditor even as against one of the husband's creditors who gave credit to him in ignorance of the wife's claim. *Dull v. Merrill*, 69 Mich. 49; *Hyde v. Powell*, 47 Mich. 156.

12. *Viotor v. Swisky*, 87 Ill. App. 583; *Rudershausen v. Atwood*, 19 Ill. App. 58; *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840.

13. *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357.

14. *De Prato v. Jester* (Ark. 1892), 20 S. W. 807; *Knox v. Clark*, 15 Colo. App. 356, 62 Pac. 334; *Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7.

or the purchase money for which had been furnished by the husband when solvent.¹⁵ And it is immaterial that the statute of limitations had run against the debt or a portion of the debt preferred, since the husband was not obliged by any duty he owed his other creditors to interpose the statute as a defense.¹⁶ Neither the statute of limitations, nor the presumption of payment arising from lapse of time, applies to a loan made by the wife to the husband, so as to render a preference of such debt by him fraudulent.¹⁷ But the fact that the debt or a portion thereof was barred by limitations is admissible in evidence in support of the claim that the conveyance was fraudulent, to be considered on the question of good faith,¹⁸ or whether or not an actual indebtedness existed.¹⁹ A conveyance by a debtor to his wife has been held to be voluntary as to creditors, where the only consideration therefor was certain sums of money furnished him by her at various times, ranging from seven to thirty years, before the conveyance was made, for which no note, acknowledgment, or promise of payment, was taken, no account kept, nor payment of interest required.²⁰

15. *Bean v. Patterson*, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126.

16. *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *Vansickle v. Wells*, 105 Fed. 16; *Kennedy v. Powell*, 34 Kan. 22; *Frost v. Steele*, 46 Minn. 1, 48 N. W. 413. See also *French v. Motley*, 63 Me. 326, the fact that the debt was barred by the statute is not conclusive evidence of a want of good faith. See

Debts barred by limitation, chap. VIII, § 22, *supra*.

17. *Rudershausen v. Atwood*, 19 Ill. App. 58; *Dice v. Irwin*, 110 Ind. 561, 11 N. E. 488.

18. *Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16.

19. *Hollis v. Rodgers*, 106 Ga. 13, 31 S. E. 783.

20. *Dillman v. Nadelhoffer*, 162 Ill. 625, 45 N. E. 680, *aff'd* 56 Ill. App. 517.

